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Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail



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Workers' Compensation Appeals Tribunal

Decision Digest Service

Volume 2

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Decision Digest Service

Volume 2

Summaries

DECISION NO. 791/90 (22/04/91) Faubert McCombie Sutherland

Continuity (of complaint) - Continuity (of treatment) - Subsequent incidents (outside work).

The worker sustained a compensable low back injury in 1975. In 1983 he experienced a sudden onset of pain while getting into his truck. A few weeks before the 1983 onset, the worker was on a roof for a day or two supervising a friend who was installing a new roof.

Though there was no continuity of medical treatment between 1977 and 1983, with the exception of one visit to the doctor in 1980, the worker's evidence of ongoing back problems was credible and was corroborated by co-workers and supervisors. From 1981 to 1983 the worker's crew leader gave him lighter work to spare his back.

The roofing incident occurred several weeks before the acute onset of pain in 1983. The worker did not perform any physical work at the time. This incident merely caused additional discomfort to the worker, but was not disabling. The truck incident involved nothing more than a normal activity of daily living - getting into a truck. It did not break the chain of causation so that the 1983 accident was no longer a significant factor in the disability.

The Panel found that the worker was entitled to benefits after the 1983 incident as his ongoing condition was related to the 1975 accident. [10 pages]

DECISION NO. 58/89 (25/04/91) Strachan Heard Gabinet

In the course of employment (work relatedness test) - In the course of employment (quasi-course of employment) - Worker (status) (during job search).

The worker suffered a back injury in 1982. She received temporary benefits for various periods from 1982 to 1988. She was granted a 15% pension in 1983.

In March 1987, the worker was involved in a motor vehicle accident while pulling out of the parking lot of an employer with whom she had just completed a job interview. She was scheduled to start work with that employer in a few days.

There was no medical connection between the back injury and the 1987 accident. The back injury did not cause the 1987 accident. For the worker's appeal to succeed, it would have to be shown that the second injury had a significant relationship with the worker's pre-accident employment.

The worker was receiving a supplement from the Board at the time of the 1987 accident, however, receipt of benefits alone is not sufficient to bring all activities of injured workers within the scope of workers' compensation.

The worker's undertaking to perform a general job search did not subject her to any significant control from the Board. She chose the dates, times, search areas, manner of transportation and routes travelled. The situation in this case was analogous to a worker proceeding to and from work, for whom there would be no

entitlement to benefits. At the time of the 1987 accident, the principle risk to which the worker was exposed was the risk of the general driving public and was thus too remote from a work-related activity or "quasi-course of employment activity" to attract benefits under the Act. A job search is not an activity peculiar to injured workers, but rather an activity common to members of the general public who are unemployed.

The situation may be different where the Board specifically dictates the time and location of the worker's attendance to a medical treatment facility, a training programme or a job interview. There is then a degree of control which may constitute the significant element of work-relatedness necessary to bring the second injury and accident within the scope of the Act.

The worker's appeal was dismissed. [8 pages]

WCAT Decisions Considered: Decision No. 79/88 reld to

DECISION NO. 990/89 (25/04/91) Faubert Fox Apsey

Consequences of injury (iatrogenic illness) (treatment) (coccygectomy) - Coccydynia.

The worker fell in 1965 and injured his tailbone (coccyx). He had recurring pain (coccydenia) and in 1969 the coccyx was removed (coccygectomy). Even after the coccygectomy, the worker continued to suffer pain in the coccyx area and he developed a low back disability which he claimed was related to the 1965 accident and the resulting surgery.

Although the worker's continuing symptoms in the coccyx area could not be explained, the preponderance of medical evidence supported a relationship between these symptoms and the compensable accident. The worker was thus entitled to a pension for the disability resulting from the removal of the coccyx.

However, the worker was not entitled to benefits for the low back condition. The worker did not injure his low back in 1965. He did not report complaints of low back pain to his treating physicians until 1971. The evidence suggested a gradual onset of low back pain in 1971. The worker did not mention low back pain to his family physician between 1977 and 1981. Significant treatment for the low back condition did not begin until 1985. It was more probable that the worker's low back pain was the result of the natural process of disc degeneration, rather than a result of his coccyx injury or the resulting surgery. [11 pages]

DECISION NO. 622/90 (25/04/91) McIntosh-Janis Ferrari Barbeau

Exposure (dust) - Permanent disability - Asthma.

The worker was a yarn winding machine operator from 1973 to 1982. In 1982, she began to experience breathing problems, diagnosed as mild asthma. The worker appealed a decision of the Appeals Adjudicator denying entitlement.

About 7% of the yarn produced was wool, the remainder being acrylic. The Panel accepted medical opinion that sensitization to wool would likely occur at higher levels of exposure and that acrylic has not been implicated as a cause of occupational asthma. However, the medical opinion also stated that the type of dust was probably not as important as the general exposure to dust.

The Panel found that the worker was entitled to health care benefits and a pension assessment. Although the worker's disability away from the workplace was not significant, she would severely aggravate her

condition if she returned to work in a dusty environment. Therefore, she had a disability for which she could be entitled to a pension. The appeal was allowed. [8 pages]

DECISION NO. 862/90 (25/04/91) Bigras Klym Jago

Jurisdiction, Tribunal (final decision of Board) - Issue setting - Chronic pain - Supplements, temporary - Rehabilitation, vocational (job search).

The worker suffered a back sprain in July 1978 and received benefits for various periods of total disability until January 1983. In January 1982, he was granted a 10% pension. In July 1982 he stopped working due to his disability and in August 1982 he was laid off by his employer due to a staff reduction.

The worker received a pension supplement from January to June 1983. He received full benefits during one week in February 1985 when he was evaluated at HRC and during November and December 1985 when he received a s. 54 supplement while receiving vocational training and assessment. In April 1988 the worker unsuccessfully attempted to return to school. In August 1988 he started part-time employment.

In a preliminary matter, the Panel held that the issues on this appeal should include the worker's entitlement for non-organic, as well as organic disability. The worker's appeal had been returned to the Board pursuant to Practice Direction No. 9. The Claims Adjudicator denied entitlement for chronic pain. When the worker refused to pursue that issue, the Hearings Officer declined to consider the matter further. The Panel held that the Tribunal did not lose jurisdiction because of the administrative decision to return the file to the Board and that the Hearings Officer's decision not to address the issue of chronic pain constituted a final decision of the Board on that issue. It was appropriate to characterize the issue on this appeal in its broadest sense -- entitlement to compensation benefits under the Act, subsequent to June 1983.

In June 1983, the worker was insisting on waiting for employment with the accident employer and stated that he was incapable of looking for work elsewhere because of his back pain. The worker had been advised that the only suitable work available at the accident employer was office work which was beyond his qualifications. The medical evidence did not support the worker's claim that he was incapable of looking for light work. The worker thus was not entitled to a pension supplement from June 1983 to April 1985. Nor was he entitled to temporary partial disability benefits for a disability beyond his pension level.

By May 1985, it was clear that the worker was looking for work in the field of electronic repair, an area in which he had received some training and thus was within his qualifications. Vocational rehabilitation had been strongly recommended by HRC doctors.

Though the evaluation performed at the end of 1985 showed that the worker was only capable of part-time employment, Board policy provided for vocational rehabilitation services being granted in such circumstances.

It was imperative for the worker to receive vocational assistance once he had agreed to co-operate and he had commenced a job search. He was thus entitled to a temporary supplement from April 1985 to April 1988. The academic program commenced in April 1988 was undertaken without Board approval, had little rehabilitative value, was beyond the worker's capabilities and the worker was paid by other social assistance programs during that period.

Compensation for chronic pain was not payable prior to March 27, 1986. The worker was not claiming chronic pain after November 1987. As the worker had been granted a supplement for the period between those two dates, it would serve no purpose to determine entitlement for chronic pain during that period, since this determination would not affect the amount of benefits. [14 pages]

WCAT Decisions Considered: Decision No. 3 (1986), 3 W.C.A.T.R. 1 *reld* to; Decision No. 915 (1987), 7 W.C.A.T.R. 1 *reld* to; Decision No. 915A (1988), 7 W.C.A.T.R. 269 *reld* to; Decision No. 638/891 (1989), 12 W.C.A.T.R. 221 *apld*; Pension Assessment Leading Case Interim Report (1986), 7 W.C.A.T.R. 365 *reld* to
Practice Directions Considered: Practice Direction No. 9 (1987), 1 W.C.A.T.R. 444
Board Directives and Guidelines: Operational Policy Manual, Document no. 03-03-05; Vocational Rehabilitation Division Manual, Document no. 01-02-02
Cases Considered: Review of Decisions No. 915 and 915A (1990), 15 W.C.A.T.R. 245 (WCB Bd. of Directors) *reld* to

DECISION NO. 822/89 (26/04/91) McGrath Fox Apsey

Issue setting - Downside risk - Jurisdiction, Tribunal (payments pending appeal) - Overpayment - Detrimental reliance - Suitable employment - Temporary partial disability (wage loss benefits) - Worker (long term service).

The worker suffered back injuries in 1980 and 1982. The worker appealed a decision of the Appeals Adjudicator granting 50% benefits from May 18, 1983, to November 30, 1983. The worker was content with the decision relating to the period from August 22 to October 5 but was seeking full temporary benefits from May 18 to August 22 and from October 5 to November 30.

A complex series of terminations and reinstatements of benefits resulted in a breakdown of the Appeals Adjudicator's decision into three different periods. The Panel found this breakdown to be artificial and decided to consider the period as a whole.

The worker was a long term service employee. According to Board policy, he was entitled to full benefits for up to six months while waiting for suitable work. In this case, the worker was entitled to full benefits from May 18 to May 24, when the accident employer notified him of light work.

The worker refused the suitable light work offered by the employer. Therefore, from May 24 to August 31, he was entitled only to the difference in salary for any wage loss he would have experienced if he had taken the light work. The Panel exercised its jurisdiction under s. 86j(2) and, considering the merits and justice and the principle of detrimental reliance, directed that no overpayment of benefits be collected by the Board for this period.

On August 31, the worker requested modified work but none was available. Pursuant to the long term service policy, he was entitled to full benefits from August 31 to November 30.

The appeal was allowed in part. [8 pages]

Ss: 86j(2)

WCAT Decisions Considered: Decision No. 182 (1988), 10 W.C.A.T.R. 1 *apld*

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-19-09

DECISION NO. 242/91I (26/04/91) Newman Jackson Preston

Adjournment (referral to Board).

The worker's appeal was adjourned so that all issues could be considered at one hearing. [3 pages]

DECISION NO. 82/90 (29/04/91) Kenny McCombie Preston*Pensions (assessment) (hip).*

Pursuant to Decision No. 82/90I, the Board found that the worker was entitled to a pension for his hip disability, which it rated at 5%. The Panel accepted that the worker was entitled to a pension for the hip disability. The case was referred back to the Board to establish a pension level for all the worker's compensable disabilities. [5 pages]

WCAT Decisions Considered: 82/90I reld to

Board Directives and Guidelines: Operational Policy Manual, Document no. 05-03-07

DECISION NO. 113/90 (29/04/91) Signoroni Fox Nipshagen*Accident (occurrence).*

The worker appealed a decision of the Hearings Officer denying entitlement for a low back disability. Considering conflicting evidence of the worker, co-workers and supervisor, the Panel found that the worker's claim was not established. The appeal was dismissed. [7 pages]

DECISION NO. 498/90L (29/04/91) McGrath Robillard Apsey*Leave to appeal (substantial new evidence) (medical report).*

The worker applied for leave to appeal a decision of the Appeal Board. New medical reports submitted by the worker were not substantially different than reports before the Appeal Board. There was evidence to support the Appeal Board conclusion.

Leave to appeal was denied. [8 pages]

WCAT Decisions Considered: Decision No. 64 (1986), 2 W.C.A.T.R. 19 reld to; Decision No. 65 (1986), 1 W.C.A.T.R. 165 reld to

**DECISION NO. 37/91 (29/04/91) Signoroni B. Cook Preston
Shiels v. Bell***Section 15 application (remoteness) - Jurisdiction, Tribunal (section 15) (Highway Traffic Act) - In the course of employment (break).*

The defendants in a civil action applied to determine whether the plaintiff's right of action was taken away. The plaintiff was working at a construction site. He was struck by a motor vehicle as he was crossing the street returning from a canteen truck during break. The defendants were the driver and the owner of the vehicle that struck the plaintiff.

The plaintiff was in the course of employment at the time of the accident. His decision to get a drink from a canteen truck at a construction site was reasonably incidental to employment.

The plaintiff submitted that the defendant vehicle owner's only nexus to the accident was his ownership

of the vehicle and that he was a defendant under provisions of the Highway Traffic Act. The Panel found that there was an employment nexus, considering that the defendants were co-workers engaged in employment activities on the day of the accident, that the defendant's vehicle was used for employment purposes and that the defendant did not allow his vehicle to be used for strictly personal reasons.

The plaintiff's right of action was taken away. [8 pages]

WCAT Decisions Considered: Final Decision No. 389 (1987), 5 W.C.A.T.R. 35 apld; Decision No. 559 (1987), 5 W.C.A.T.R. 78 consd; Decision No. 597/87 consd

Other Statutes Considered: Highway Traffic Act, R.S.O. 1980 c. 198, s. 166(1)

DECISION NO. 98/91 (29/04/91) Signoroni B. Cook Apsey

Continuing entitlement.

The worker injured the left side of his body in a twisting accident in October 1986. The worker returned to work in December 1986 but stopped work the same day due to left shoulder pain. The worker appealed a decision of the Hearings Officer denying entitlement subsequent to December 1986.

The Panel was satisfied that the worker experienced left shoulder symptoms from October 1986 and that his condition subsequent to December was related to the compensable accident. The appeal was allowed. [7 pages]

DECISION NO. 222/91 (29/04/91) McCombie B. Cook Preston

Temporary disability (beyond pension level).

The worker suffered a back injury in 1978 for which he was awarded a 10% pension. The worker began a job assessment in December 1983 and was hired by the company at the end of January 1984. The worker stopped working after one week claiming the work was unsuitable. The worker appealed a decision of the Hearings Officer granting 50% benefits until August 1984.

The Panel agreed with the Hearings Officer that the worker was disabled beyond his pension level until August 1984 but that the worker was not cooperating or making himself available for employment during this time. The appeal was dismissed. [9 pages]

DECISION NO. 504/88 (30/04/91) Strachan B. Cook Clarke

Delay (onset of symptoms) - Overpayment.

A labourer was struck on his hard hat and the back of his neck by a lump of dirt that fell from a back hoe. The employer appealed a decision of the Hearings Officer granting entitlement for low back disability.

The worker had preexisting spondylolisthesis. The Panel accepted medical opinion that, if the accident had transmitted force sufficient to aggravate the low back condition, the worker would have had some immediate pain. Considering mechanics of the accident and delay in onset of the low back condition until four months after the accident, the Panel found that the low back condition was not related to the accident.

The appeal was allowed. In view of hardship to the worker, the Panel directed the Board not to recover the overpayment created by this decision. [8 pages]

DECISION NO. 482/90 (30/04/91) Kenny B. Cook Seguin

Hearing loss - Health care (appliances or apparatus) (hearing aid) - Board Directives and Guidelines (hearing loss) (hearing aid) - Injury by accident - Injuring process - Words and phrases (entitled to compensation, s. 52(1)).

The worker appealed a decision of the Hearings Officer denying entitlement to health care or permanent disability benefits for hearing loss.

The worker had hearing loss of 20 decibels in one ear and 25 decibels in the other. The hearing loss was related to noise exposure at work. However, it was not sufficiently severe to award a pension.

For health care benefits, Board policy requires a minimum loss of 25 decibels in each ear. The Board was of the view that a worker must suffer a particular degree of handicap before being entitled to health care and that medical evidence does not establish a handicap if the hearing loss is less than 25 decibels bilaterally. The Panel considered this policy in light of the health care provisions in the Act.

Section 52 provides for provision of such health care benefits as may be necessary to workers who are entitled to compensation. The Panel interpreted "entitled to compensation" as meaning entitled to benefits under s. 3(1) of the Act. To be entitled to benefits under s. 3(1), a worker must have an injury by accident arising out of and in the course of employment. A worker may be entitled to benefits even though not actually entitled to be paid benefits, as for example, an office worker who suffers an ankle injury at work but is able to perform regular duties.

The employer submitted that, to be compensable, hearing loss must be a disablement under s. 1(1)(a)(iii) and that a worker is not disabled unless there is an impairment of earning capacity. The Panel stated that disablement is different from disability and different from impairment of earning capacity. Section 1(1)(a) describes particular types of injuring processes which lead to injury. If hearing loss is considered under the disablement provisions, the "disablement" is the injuring process whereby exposure to noise damages certain structures of the ear and the "injury" is the damage which is done to those structures. Thus, a worker with occupational noise-induced hearing loss has sustained an injury by accident within the meaning of s. 3(1), regardless of the degree of hearing loss. If hearing loss were considered under s. 122, the damage to the ear would be the disease and it would be a compensable injury under s. 3(1).

For purposes of s. 52, the important issue is whether there is a compensable injury. Section 52 contemplates that health care benefits will be paid when a work injury requires health care even though the injury may not be disabling.

In this case, health care benefits in the form of hearing aids were necessary as a result of the injury. There was medical opinion that hearing loss of 20 decibels would likely result in some handicap in every day life. The worker's treating specialist recommended hearing aids.

The Panel concluded that the worker was entitled to health care benefits for hearing aids. [19 pages]

Ss: 52(1), 52(1)(a), 3(1)

WCAT Decisions Considered: Decision No. 915A (1988), 7 W.C.A.T.R. 269 *reld to*; Decision No. 559/87 (1988), 9 W.C.A.T.R. 103 *reld to*; Decision No. 257/89 (1990), 14 W.C.A.T.R. 87 *reld to*; Decision No. 362/90 (1990), 15 W.C.A.T.R. 195 *reld to*; Decisions No. 425/88 *reld to*, 331/90 *reld to*, 688/90 *reld to*

Board Directives and Guidelines: Policy Statement - Hearing Loss, Board Minute 4, June 3, 1988, p. 5238

Cases Considered: *Madill v. Chu* (1976), 71 D.L.R. (3d) 295 (S.C.C.) *consd*; *Review of Decisions* No. 915 and 915A (1990), 15 W.C.A.T.R. 245 (WCB Bd. of Directors) *reld to*

DECISION NO. 770/90 (30/04/91) Starkman McCombie Chapman

Pensions (assessment) (finger) - Pensions (assessment) (back) - Supplements, temporary (wage loss) (period of adjustment).

A butcher suffered a lacerated index finger in 1981 and a low back strain in 1984. The worker appealed a decision of the Hearings Officer confirming a 0% assessment for back and finger disabilities and denying a wage loss supplement subsequent to July 1985.

The worker was able to continue working without any significant reporting of finger symptoms since 1983. The Panel confirmed the 0% rating for the worker's finger.

Medical examination subsequent to the pension assessment indicated that the worker was suffering from back pain which was restricting his movement. The Panel awarded a 10% pension for back disability retroactive to 1987.

The worker received a wage loss supplement for six months. This was in accordance with Board policy and was sufficient to allow the worker to adjust to his lower rate of pay.

The appeal was allowed in part. [8 pages]

DECISION NO. 217/91L (30/04/91) Signoroni Rao Nipshagen

Leave to appeal (good reason to doubt correctness) (consideration of issue) - Jurisdiction, Tribunal (final decision of Board).

The worker applied for leave to appeal a decision of the Appeal Board increasing the worker's pension from 15% to 20%. The worker wanted continuation of temporary benefits. In order to consider this issue, the point when the worker reached maximal medical rehabilitation had to be determined. However, the Appeal Board never addressed this issue. It appeared to proceed on the assumption that the condition was permanent. As this issue had not been determined, the worker could pursue it at the Board. [5 pages]

DECISION NO. 259/91L (30/04/91) Onen Lebert Preston

Leave to appeal (good reason to doubt correctness) (consideration of issue) - Expenses (clothing damage).

The worker was exposed to poison ivy at work. On the recommendation of his doctor, he destroyed the clothing he was wearing at the time. The worker applied for leave to appeal a decision of the Appeal Board denying a claim for the cost of the clothing. The Appeal Board rejected the claim because it did not constitute a medical or rehabilitative measure and because there is no provision in the Act for replacement of personal belongings.

The Appeal Board considered the relevant sections of the Act concerning medical aid and rehabilitation and reached its conclusion. The conclusion was not unreasonable. Leave to appeal was denied. [5 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 04-04-03

DECISION NO. 267/91 (30/04/91) McCombie Jackson Jago

Delay (onset of symptoms).

The worker suffered a right elbow injury in 1978. The worker appealed a decision of the Hearings Officer denying entitlement for left shoulder, arm and wrist disability. Considering delay in onset of symptoms and inconsistencies in the worker's evidence, the Panel found that the worker was not entitled to benefits for left side disability. The appeal was dismissed. [8 pages]

DECISION NO. 149/88R (02/05/91) Faubert Lebert Barbeau

Reconsideration.

The worker's request to reconsider Decision No. 149/88 was denied. The Panel considered the evidence. The worker did not provide any new argument or evidence which would cause it to weigh the evidence differently than the Hearing Panel. [5 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decisions No. 72R reld to, 72R2 reld to, 149/88 consid

DECISION NO. 529/90 (02/05/91) Moore B. Cook Meslin

Fibromyalgia.

The worker suffered a neck and shoulder injury in November 1984 and received benefits until May 1985. The worker appealed a decision of the Hearings Officer denying entitlement for fibrositis.

There was evidence of fibrositis prior to the compensable injury. The fibrositis condition did not deteriorate until 1987. The worker was not entitled to benefits for fibrositis. However, the evidence did indicate a permanent shoulder disability related to the compensable accident.

The appeal was allowed in part. The Board was directed to assess a pension for shoulder disability, retroactive to the date of termination of temporary benefits in 1985. [9 pages]

WCAT Decisions Considered: 529/90I reld to

Board Directives and Guidelines: Operational Policy Manual, Document no. 05-03-11

DECISION NO. 76/91 (02/05/91) Hartman Robillard Barbeau

Medical examination (section 21).

The worker applied for an order that she should not be required to attend a medical examination requested by the employer. The worker had returned to modified work, working less hours and being provided with a chair. By the time of the requested examination, the worker was working full hours and was, essentially, performing her regular duties.

The Panel found that the employer did not have a valid compensation goal. The failure to review the actual work performed post-accident suggested that its compensation goal, of the worker's prognosis for

return to regular duties, was not genuine. The Panel noted, however, that the worker showed no particular desire to return to regular status, even though she was performing regular duties.

The worker was not required to attend the examination. [5 pages]

DECISION NO. 161/91I (02/05/91) Chapnik Lebert Ronson

Jurisdiction, Tribunal (final decision of Board) - Chronic pain - Adjournment (referral to Board).

The issue before the Hearings Officer had been entitlement for recurrence of the worker's elbow disability. In denying the worker's claim, the Hearings Officer noted a medical report which indicated that the worker had been treated for both the elbow condition and depression.

The Hearings Officer's observation, that the issue of non-organic disability had not been "ruled upon or recognized" by the Board, did not take away the Tribunal's jurisdiction or preclude the Tribunal from considering the whole person. The issue, in its broadest terms was entitlement to benefits during the period in question. The main medical report in this case referred to both organic and non-organic aspects of the disability. It would be difficult to attempt to segregate the organic causes from the non-organic causes of the worker's disability.

At the hearing of this appeal the worker had intended to proceed only on the basis of the organic disability and was not prepared to deal with non-organic causes for the disability such as chronic pain. The Board's chronic pain disorder policy was not in effect at the time of the Hearings' Officer decision. There was thus no initial assessment made as to whether the worker's pain arose predominantly from organic or non-organic sources.

The worker's request for an adjournment was granted. The Panel was not prepared to confine itself to the organic issues only and it was not in a position to determine whether the non-organic aspects of the worker's condition were referable to the compensable accident. The matter was referred back to the Board for a decision with respect to the worker's entitlement under the chronic pain disorder policy. [4 pages]

WCAT Decisions Considered: Decision No. 638/89I (1989), 12 W.C.A.T.R. 221 reld to; Decision No. 487/89I apld

DECISION NO. 227/91 (02/05/91) Chapnik Jackson Preston

In the course of employment (reasonably incidental activity test) - In the course of employment (break) - In the course of employment (employer's premises) - Arising out of employment (takes self out of employment) - Arising out of employment (distinct departure test) - Chance event.

The worker was a lead hand with the employer. His duties were to assign work to employees at the direction of the foreman. While on his coffee break, the worker stopped to help a co-worker dislodge a candy bar that was stuck in a vending machine. The worker struck, with his hand, what he thought to be the plastic facing of the machine. The facing was in fact glass which shattered and lacerated the extensor tendon of the worker's hand.

The shattering of the glass due to the worker's banging was a chance event accident.

The use of the vending machines provided by the employer was an ordinary hazard of the employer's premises. The worker's actions were thus reasonably incidental to his employment and he was in the course of his employment.

Though the worker may have banged the machine in frustration, there was no deliberate misuse of the

equipment. There were no signs and no company procedures or policy against tampering with the vending machines. The presence of the phone number of the supplier of the vending machines, who could be contacted for refunds, was medal. It was common practice for employees to shake machines to free a product. By failing to deal with this situation, the employer had in effect condoned such actions.

The worker's job as a lead hand required him to provide leadership and assistance to other employees in the performance of their duties. In assisting the co-worker to dislodge the candy bar, the worker acted in a manner consistent with his work activity. His actions did not constitute a distinct departure from his employment for personal reasons.

The presumption in s. 3(3) thus had not been rebutted and the accident arose out of the employment as well as occurring in the course of the employment. [7 pages]

WCAT Decisions Considered: Decision No. 101/90 distd

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document nos. 33-01-02, 33-05-01, 33-14-01

DECISION NO. 248/91 (02/05/91) Moore M. Cook Apsey

Access to worker file, s. 77.

The worker withdrew his objection to release medical information. Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 139/90 (06/05/91) Marafioti Beattie Meslin

Accident (occurrence) - Investigation by Tribunal (Tribunal investigator).

The worker appealed a decision of the Hearings Officer denying entitlement for a right shoulder condition which he related to an incident at work in June 1984 when he grabbed an air gun but the gun would not release from its holder.

There was a delay in reporting the injury as well as discrepancies in the evidence. The medical evidence did not support a relationship of the condition to the alleged incident. Post-hearing investigation by the Tribunal's investigator failed to provide support for the claim. The appeal was dismissed. [5 pages]

DECISION NO. 173/91 (06/05/91) Newman B. Cook Chapman

Pensions (assessment) (shoulder) - Preexisting condition (arthritis) (cervical) - Psychotraumatic disability - Supplements, older worker.

The worker suffered a left arm injury in December 1977. He returned to work after a few days and continued to work until 1982. In 1984, he was awarded a 5% pension for arm and shoulder disability. The worker appealed a decision of the Hearings Officer confirming the pension, denying entitlement for a neck disability and psychotraumatic disability and denying an older worker supplement.

The 5% pension was assessed in 1984 and confirmed on reassessment in 1986. The assessments were consistent. They showed a thorough understanding of the worker's complaints. Considering the Rating Schedule, the Panel found that the 5% rating was appropriate.

The worker had preexisting degenerative cervical arthritis. On the evidence, the neck disability was not related to the accident.

On the evidence, the accident was not a significant contributing factor to development of an emotional disability.

The worker was not entitled to an older worker supplement since his impairment of earning capacity was not significantly greater than is usual.

The appeal was dismissed. [10 pages]

DECISION NO. 192/91 (06/05/91) Sandomirsky Higson Meslin

Accident (occurrence).

The Panel found that the worker did not suffer an injury by accident at work. The worker's communication problems, resulting from his speech and hearing impairment, could not explain away his conflicting reports as to the occurrence of the accident. The medical evidence did not support the conclusion that the worker had a back problem. All tests were reported as normal. There were no findings except the worker's report of pain. [7 pages]

DECISION NO. 194/91 (06/05/91) Moore Beattie Jago

Rehabilitation, vocational (relocation expenses) - Discretion, Board (rehabilitation) (relocation expenses).

In January 1985 the worker was referred to the Board's vocational rehabilitation division. The Board sponsored him in several upgrading programmes. The worker began his rehabilitation programme in his home town of Red Lake, but later moved to Sault Ste Marie. In May 1986 the Board arranged a training-on-the-job work assessment for the worker in Wawa. In August 1986 the work assessment was terminated by the employer.

In September 1986 the worker obtained employment on his own in Red Lake and he moved back there to start the job in October. The Board began sponsorship of the worker's participation in that job in November. The Board's involvement with the programme was terminated in February 1987 and the worker was hired on a full-time basis. He remained in that employment for one-and-one-half years.

The worker sought entitlement to his relocation expenses for the move from Wawa to Red Lake in September 1986, notwithstanding that he had not obtained prior approval from the Board. The worker argued that the Board should exercise its discretion under s. 54 of the Act so as to grant retroactive entitlement for relocation expenses as the worker had succeeded in obtaining suitable employment.

The worker's move occurred without the worker first having ascertained that there were suitable employment opportunities in Red Lake. This was a requirement of Board policy. Failure to do so was more than just a technical breach. The decision to move was essentially a personal one. The move was made without authorization or encouragement from the Board. The Board participated in the worker's rehabilitation programme after the move, but it did not participate in any meaningful way in the decision to move.

Unauthorized relocation by a worker makes it impossible for the Board to determine whether certain of its policy requirements can in fact be met. The Board was thus deprived of the opportunity to exercise the kind of control that s. 54 envisions. The worker's claim for relocation expenses was denied. [8 pages]

WCAT Decisions Considered: Decision No. 375/89 (1989), 11 W.C.A.T.R. 336 consd
Board Directives and Guidelines: Claims Services Division Manual s. 54, p. 194, Directive 7

DECISION NO. 322/89 (07/05/91) Carlan (dissenting) Heard Apsey

Accident (definition of) (effect of personnel action) - Stress (effect of personnel action) - Disablement (stress) - Collective agreement - Hypochondriacal neurosis.

In Decision No. 322/89I, the Panel found that a firefighter was not entitled to benefits for burnout. In this decision, the Panel considered entitlement for a psychological disability, diagnosed as hypochondriacal neurosis, arising from stress associated with a demotion from the rank of captain to firefighter.

The worker was demoted as a result of an amalgamation of the worker's small town with a larger city. The amalgamation was negotiated over a number of years. The demotion was negotiated by the unions involved and became part of the amalgamation agreement.

The majority of the Panel found that the demotion was not an "accident". It has generally been agreed in Tribunal decisions that unexpected events and unexpected results of expected events are considered accidents. In this case, there was not an unexpected event since the demotion followed years of negotiation. There was not an unexpected result since the unexpected result type of accident has been associated with injuries such as heart attacks where there is a physical injury.

Further, there was not a disablement. The onset of disability in this case was attributable to an event related to the worker's employment contract rather than to his employment. The workers' compensation system was not intended to affect actions for wrongful dismissal or violation of collective agreements. These are not accidents within the scope of the Act.

In addition, when looking at the actual rather than the perceived results of the demotion, the Panel could not identify a cause for the worker's disability. He believed that people were laughing at him and teasing him. However, there was no evidence that these things actually happened.

The majority concluded that the worker did not suffer an accident in the course of employment which resulted in personal injury. The appeal was dismissed.

The Vice-Chairman, dissenting, stated that workers' compensation is a no fault scheme and that the consequences of an injuring process at work are compensable, even if the employer is not to blame for the injury. In this case, the worker experienced a disablement. Even though it could not be established that co-workers teased him, the worker suffered a true feeling of loss as a result of the demotion. The demotion arose out of and in the course of employment. Although there may be other mechanisms for recovery of losses resulting from personnel action, that does not mean that the workers' compensation system can ignore its mandate. [21 pages]

WCAT Decisions Considered: Decision No. 72 (1986), 2 W.C.A.T.R. 28 reld to; Decision No. 42/89 (1989), 12 W.C.A.T.R. 85 reld to; Decision No. 145/89 (1990), 14 W.C.A.T.R. 74 reld to;

**DECISION NO. 256/90 (07/05/91) Signoroni (dissenting) B. Cook Sutherland
Glover v. Albel**

Section 15 application - In the course of employment (work relatedness test) - In the course of employment (takes self out of employment) (dangerous driving) - In the course of employment (takes self out of employment) (misconduct) - Misconduct.

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken away. The plaintiff was a passenger in a vehicle driven by the defendant. The defendant was driving on a gravel road at speeds of up to 140 km per hour, when he lost control of the car. The defendant was charged with dangerous driving under the Criminal Code and convicted.

The plaintiff and defendant were employees of different rental car companies. They had driven rental cars to an airport location and were returning to the company offices at the time of the accident.

Section 8(9) provides that no worker has a right of action against another worker for an injury for which benefits are payable where the workers of both employers were in the course of employment at the time of the happening of the injury. Section 8(9) refers only to the course of employment and not to arising out of employment.

There was no question that the plaintiff sustained an accident arising out of and in the course of employment and that, therefore, in appropriate circumstances, he would have an election whether to bring a civil action.

The defendant submitted that s. 8(9) considers only whether the defendant was in the course of employment. If the activities of the defendant are not considered in determining course of employment, it could be found that the defendant in this case was in the course of employment and, therefore, that the plaintiff's right of action was taken away.

The Panel agreed with Decision No. 24F that in the course of employment should be considered as part of the general question of whether the accident was employment related. In cases where evidence was unavailable and the presumption would be significant, it would be determined by considering location, time and purpose but not activities. In a determination under s. 8(9), there is no distinction between the status of the defendant and the status of the plaintiff. The phrase "in the course of employment" in s. 8(9) means the same as the phrase "arising out of and in the course of employment" in s. 3(1). Accordingly, in a determination under s. 8(9) where the defendant's activities are in issue, the essential question is whether those activities were employment related.

It was not intended that there should be differences between plaintiffs, claimants and defendants in determining whether they are in the course of employment. The Panel based this conclusion on legislative history of s. 8(9) and on the full context of the section, which provides for cost transfers in cases of negligence.

The majority of the Panel found that the defendant's activities were employment related. He was driving his employer's vehicle directly to his employer's place of business for purposes related to employment. He was doing his job in a negligent way and was engaged in serious and wilful misconduct but was, nevertheless, performing the very work which he was employed to do.

Since the defendant was in the course of employment, the plaintiff's right of action was taken away. The Board was directed to consider a transfer of costs to the defendant's employer.

The Vice-Chairman, dissenting, found that, considering the extreme, irresponsible and criminal manner of driving, it could not be said that the accident was the outcome of employment related factors. [29 pages]

Ss: 3(1), 8(9)

WCAT Decisions Considered: Decision No. 24F (1990), 13 W.C.A.T.R. 1 apld; Decision No. 234/87 (1989), 10 W.C.A.T.R. 64 reld to; Decision No. 42/89 (1989), 12 W.C.A.T.R. 85 reld to; Decision No. 405/90 (1990), 16 W.C.A.T.R. 244 consd; Decisions No. 879/87 reld to, 622/89I reld to, 804/89 reld to, 351/90 consd

Board Directives and Guidelines: Operational Policy Manual, Document no. 03-01-02

Cases Considered: WCB v. CPR and Noell, [1952] 2 S.C.R. 359 consd

DECISION NO. 426/90 (07/05/91) Strachan Klym Preston

Continuing entitlement - Exposure (glue).

The worker was exposed to glue and solvents while working for a shoe manufacturer. She stopped working in September 1986 due to a respiratory condition and received benefits until November 1986. The worker appealed a decision of the Hearings Officer denying benefits subsequent to November 1986.

The Board granted benefits until November 1986 for rhinitis and conjunctivitis. On the evidence, those conditions had cleared by November 1986. In 1987, the worker was treated with cryosurgery for left sided face pain and burning sensation (although cryosurgery is normally used in cases of nasal obstruction). The worker's continuing complaints were related to results from the cryosurgery. However, the cryosurgery was not related to the compensable rhinitis or conjunctivitis.

The appeal was dismissed. [14 pages]

DECISION NO. 562/90 (07/05/91) Kenny Robillard Apsey

Significant contribution (of compensable accident to disability).

In 1941 the worker was hit in the hip or the small of the back by an 800 pound muck truck. He was knocked out and taken to the doctor, but he did not otherwise lose time from work. He was, however, put on light duties for a while. In 1942, shortly after entering the army, it was noted that the worker walked with a limp. In 1945, while still in the army, the worker experienced a gradual onset of leg and back pain. An extruded disc was diagnosed. The worker was unable to work for periods in 1947 and 1949 due to his back condition. In 1951 the worker had another work accident and workers' compensation benefits were paid on the basis of aggravation of a pre-existing non-compensable back condition.

In 1952 the worker had surgery in which a large disc extrusion was removed. The Department of Veterans' Affairs (DVA) paid for the surgery. The worker did not have further significant back problems until 1972, at which time the DVA granted him a pension. However, the DVA reduced the worker's pension by 40% on the basis that he had a back disability before enrolling in the army. The worker wanted the Board to make up the difference in his DVA pension.

The Panel found that the 1941 work accident likely injured the worker's back and made him more vulnerable to future episodes of incapacitating back pain. The worker's back had not returned to its pre-accident condition after the 1951 work accident. Though the need for surgery may have been inevitable, the 1951 accident appeared to hasten it.

There were non-compensable causes for the worker's 1952 surgery and permanent back disability, which may even have been the major causes. However, the 1941 accident was a significant cause of the surgery and disability. The 1951 accident was also significant, though less so than the 1941 accident and the non-compensable causes. It was left to the Board to decide what benefits should be paid to the worker. [12 pages]

DECISION NO. 599/90 (07/05/91) Strachan Higson Nipshagen

Delay (onset of symptoms) - Disc, herniated.

The worker was struck on the forehead in a minor accident in September 1985, causing her to step off a

four inch platform. The worker appealed a decision of the Hearings Officer denying entitlement for a herniated disc.

Considering delay in onset of back symptoms, the Panel found that the back condition was not related to the accident. The appeal was dismissed. [7 pages]

DECISION NO. 974/90 (07/05/91) Sandomirsky Felice Apsey

Transcript - Procedure (Practice Direction No. 4) - Hearing (de novo) - Words and phrases (de novo) - Suitable employment.

The worker appealed a Hearings Officer decision denying her continuing benefits subsequent to January 1985.

In a preliminary matter, the Panel refused to consider the evidence of the employer's personnel manager that was contained in the transcript of the Hearing Officer's decision. The personnel manager was not brought to the hearing although she was available.

Hearings by the Tribunal are "de novo" proceedings. This term contemplates an entire new trial in the same manner in which the matter was originally heard and a review of the previous hearing. Where possible, evidence should thus be taken directly from witnesses, rather than from transcripts. The employer, in this case, was relying on the transcript evidence to challenge the credibility of the worker. That challenge was limited without the opportunity for the worker and the Panel to question the witness and judge the credibility of her testimony. It is not possible to test the credibility of transcript evidence.

The worker suffered a back strain in August 1984. The medical evidence indicated minimal findings. The medical reports indicated that the worker's symptoms and level of disability were out of proportion with the degree of injury and organic pathology. In January 1985 the worker attempted to return to modified duties. She claimed to be unable to perform either of the jobs offered by the employer -- one because it involved use of a foot pedal, the other because it involved repetitive bending. Neither of these activities was within the worker's medical restrictions at the time. The first mention of a restriction on bending was by the family doctor in October 1986.

Considering the light nature of the work, and the minimal medical findings, the Panel found that the worker was not prevented from returning to work by an organic disability. The Panel made no finding on the question of a non-organic disability. [7 pages]

Practice Directions Considered: Practice Direction No. 4 (1989), 8 W.C.A.T.R. 364

DECISION NO. 18/91 (07/05/91) Signoroni Ferrari Nipshagen

In the course of employment (residential employees) - Sailor.

The worker was a cook on a ship. While the ship was docked, he went to a nearby marina to use the telephone to call home. He injured his leg on the way back to the ship. The worker appealed a decision of the Hearings Officer denying entitlement.

A cellular phone on board the ship could not be used for personal calls. The worker had finished his work for the day and was not being paid at the time of the accident. However, he was always on call and had to notify a designated member of the employer's staff of his whereabouts when he left the ship so that he could be recalled promptly, if necessary.

The Panel found that the worker was engaged in an activity that was reasonably incidental to the nature and conditions of employment as a sailor assigned to long term duties on a ship. The appeal was allowed. [4 pages]

DECISION NO. 286/91 (07/05/91) McCombie Jackson Shuel

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 287/91 (07/05/91) McCombie Lebert Shuel

Access to worker file, s. 77 (subsequent disclosure).

Access to the worker's file was granted to the employer. The worker was concerned about disclosure of the material. However, there were assurances from the employer that there would be strictly limited access to the records. [4 pages]

Wcat Decisions Considered: 466/88 reld to

DECISION NO. 538/87LR3 (08/05/91) McIntosh-Janis Lebert Nipshagen

Reconsideration.

The worker's request to reconsider Decision No. 538/87L was denied. A letter from the worker's doctor was not sufficiently weighty to justify reopening the original decision. [6 pages]

**DECISION NO. 1034/89 (08/05/91) Marcotte Higson Preston
Giroux v. Menard**

Section 15 application - Out of province (accident in Ontario) (worker not resident of Ontario) - Worker (contract of service) - Transportation industry (truck driver).

The defendants in a civil action applied to determine whether the plaintiff's right of action was taken away. The plaintiff was a long distance truck driver from Quebec. He was involved in an accident in Ontario in the course of his employment while driving from Montreal to Toronto. He would have gone to his employer's facilities in Toronto and returned to Montreal the same day. His employer was registered as a Schedule 1 employer in Ontario.

In *British Airways Board v. Workers' Compensation Board*, the British Columbia Court of Appeal found that the definition of worker, which included a person who enters into a contract of service, must be read as if it included the words "in British Columbia". A sufficient connection between employment and the province could be established on the basis of work in the province or contract of employment made in the province.

In this case, the contract of employment was made in Quebec. Therefore, the critical issue is whether

the plaintiff worked in Ontario. There was no dispute that the plaintiff's employer was a Schedule 1 employer. However, that was not determinative of whether the plaintiff was a worker for purposes of the Act. The Panel applied the sufficient presence test to determine that issue.

The Panel found that the worker had a transitory presence in Ontario only that was not sufficient to meet the sufficient presence test, considering the following indicia of employment: his route started and finished out of the province; he did not live in Ontario, did not sign a contract in Ontario and was not paid in Ontario; he was a regular on the Montreal-Toronto route but did not drive that route exclusively.

The plaintiff was not a worker for purposes of the Act. His right of action was not taken away. [22 pages]

Ss: 1(1)(z)

WCAT Decisions Considered: Decision No. 820 (1987), 6 W.C.A.T.R. 81 consd; Decision No. 546 not folld

Other Statutes Considered: Workers Compensation Act, R.S.B.C. 1979 c. 437, ss. 1, 5

Cases Considered: British Airways Board v. Workers' Compensation Board (1985), 17 D.L.R. (4th) 36 (S.C.C.) consd; Re B.C. Coal Ltd. and United Mine Workers of America, Local 7292 (1984), 12 D.L.R. (4th) 243 (B.C.C.A.) distd; Desharnais v. C.P.R., Shaw v. C.P.R., Harrison v. C.P.R., [1942] 4 D.L.R. 605 (Sask. C.A.) distd; Krzus v. Crow's Nest Pass Coal Co. (1912), 8 D.L.R. 264 (P.C.) distd; The Queen in right of Manitoba v. Air Canada (1980), 111 D.L.R. (3d) 513 (S.C.C.) consd

DECISION NO. 787/90 (08/05/91) Strachan Felice Sutherland

Pensions (provisional) - Permanent disability - Pensions (assessment) (neck) - Benefit of the doubt.

The worker suffered an injury at work in March 1980 that resulted in pain in her neck, upper back and left arm. She received periods of temporary benefits up to November 1981. In 1986, the worker was granted a 10% provisional award, for an organic disability, covering the period from November 1981 to March 1986. She subsequently was granted a 15% provisional award for a chronic pain disorder. The worker claimed that the organic provisional award should be made permanent and that the 10% rating was inadequate. The chronic pain award was not in issue on this appeal.

The worker had seen many doctors and the medical reports contained a variety of diagnoses and opinions. The worker suffered from several conditions prior to 1980. It was clear that the worker had an emotionally vulnerable personality that pre-dated the 1980 accident, however, it was also clear that the worker did sustain a cervical and shoulder strain as a result of the accident. The extent of the organically based disability which resulted was not clear.

The Panel was unable to discern any significant medical differences in the worker during the periods preceding and following March 1986. The evidence for and against the existence of an organically based disability was approximately equal. Therefore, by extending the benefit of doubt to the worker, the worker was entitled to an award after March 1986.

The worker's condition was described as persistent muscle discomfort in the shoulder and neck area, exacerbated by attempting to use an arm that continued to have a permanent but mild disability. Given the conflicting nature of the voluminous medical evidence, there was no reason to deviate from the 10% rating. The 10% award should thus continue beyond March 1986 until the Board could complete a whole person assessment which would take into account the worker's disability based on both organic and non-organic components. [9 pages]

DECISION NO. 845/90 (08/05/91) Signoroni Chapman McCombie (dissenting)

In the course of employment (parking lots) - In the course of employment (proceeding to and from work) - In the course of employment (work relatedness test) - Arising out of employment (parking lots).

The worker was a hospital employee. After completing her shift, she left the employer's building, crossed a public street and slipped while walking through an employer-owned parking lot to get to her car which was parked on a public street. The employer appealed a decision of the Hearings Officer granting entitlement.

The parking lot was across the street from the hospital. It was owned and controlled by the hospital and was open for staff, patients, visitors and the public. There was a sign restricting access to parking patrons only.

The majority of the Panel agreed with Decision No. 674/89 that a rigid application of the premises test was unreasonable and that the determination of entitlement must revolve around the strength of the connection between the accident and employment. In this case, the parking lot, although controlled by the employer, was in essence a public parking lot. The worker had completed her shift and entered a public street. She entered the parking lot as a member of the public, contrary to posted notices limiting access to patrons. Once she entered the street, she was engaged in the normal activity of commuting to and from work. Entering the parking lot did not establish a work related connection.

The majority found that the accident was not work related. The appeal was allowed.

The Worker Member, dissenting, considered the tests for arising out of and in the course of employment. The difficulty with the work relatedness test, which collapses the arising out of and in the course of issues into one, is that there are provisions, particularly the presumption, where the interpretation of the two issues is critical. It is necessary for the two causation branches to receive separate definitions which stand on their own. In this case, the parking lot was under the control of the employer and formed part of the employer's premises. Although going through the parking lot was not explicitly condoned, it was not actively discouraged. Given the degree of control by the employer, the accident arose out of employment. [20 pages]

WCAT Decisions Considered: Decision No. 24F (1990), 13 W.C.A.T.R. 1 consd; Decision No. 229 (1986), 2 W.C.A.T.R. 118 reld to; Final Decision No. 389 (1987), 5 W.C.A.T.R. 35 reld to; Decision No. 369/87 (1987), 6 W.C.A.T.R. 113 reld to; Decision No. 547/87 (1988), 8 W.C.A.T.R. 160 consd; Decision No. 733/87 (1988), 8 W.C.A.T.R. 183 reld to; Decisions No. 313-reld to, 533 reld to, 690/87 reld to, 738/87 reld to, 217/88 reld to, 977/88 reld to, 674/89 consd, 351/90 consd

Board Directives and Guidelines: Claims Services Division Manual, s. 3(1), p. 47, Directive 21; Operational Policy Manual, Document no. 03-01-02; Discussion paper: Work-relatedness in the Workers' Compensation System, April 20, 1990

Cases Considered: Workmen's Compensation Board v. C.P.R. and Noell, [1952] 3 D.L.R. 641 (S.C.C.) reld to

DECISION NO. 859/90 (08/05/91) Starkman Lebert Chapman

Continuing entitlement - Hearing loss.

The worker suffered arm and upper back injuries in an accident in April 1976 and received benefits until June 1976. He suffered hearing loss in 1981 for which he was awarded a 2.4% pension. The worker appealed a decision of the Hearings Officer denying further benefits for the arm and back injuries and confirming the hearing loss pension.

On the evidence, the continuing back and arm problems were related to a congenital disc fusion and degenerative disc disease and not to the 1976 accident. Deterioration in the worker's hearing may have been attributable to ageing or variances in the accuracy of audiograms.

The appeal was dismissed. [6 pages]

DECISION NO. 140/91 (08/05/91) Hartman B. Cook Clarke

Consequences of injury (altered gait).

The worker suffered a fractured right femur in 1953 and strained right knee ligaments in 1987. The worker appealed a decision of the Hearings Officer denying entitlement for current knee disability, diagnosed as osteoarthritis.

The worker's right leg was a half inch shorter than the left as a result of the 1953 accident. The Panel found that the current knee condition was related to the 1953 accident. The 1987 accident was not a significant contributing factor. The appeal was allowed. [8 pages]

DECISION NO. 237/91 (08/05/91) Sandomirsky Lebert Apsey

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 793/90 (09/05/91) Onen B. Cook Chapman

Temporary disability (beyond pension level) - Suitable employment.

The worker suffered severe burns in 1985, for which he was awarded pensions totalling 57%. He returned to extremely modified work in March 1987. In November 1987, he suffered a shoulder sprain. He received temporary benefits until November 1988. The worker appealed a decision of the Hearings Officer denying full temporary benefits from November 1988 to March 1989.

On the evidence, the worker was still experiencing some shoulder symptoms subsequent to November 1988. He was temporarily partially disabled. However, he failed to accept suitable work with no wage loss. Since his return to work in March 1987, the employer made extremely modified work available to the worker and did not pressure him to produce. The employer had been very accommodating. The Panel was satisfied that the minor shoulder disability could have been accommodated. The appeal was dismissed. [13 pages]

WCAT Decisions Considered: 793/901 reld to

DECISION NO. 79/91 (09/05/91) Bigras Beattie Seguin

Pensions (stacking) - Pensions (assessment) (whole person concept) - Pensions (assessment) (chronic pain) - Pensions (assessment) (leg).

The worker suffered a crush injury to his right leg in October 1984, for which he was awarded a 15% pension. The Board also found that he suffered from chronic pain which it rated at 10% but since the Board does not stack pensions, no additional amount was awarded. The worker appealed a decision of the Hearings Officer denying an increase in the pension.

The Panel found that the worker's condition represented slightly more than half the loss of use of a lower leg. Comparing the worker's condition to the Rating Schedule of 25% for immobility of the knee, the Panel confirmed the 15% rating.

The Panel also confirmed the 10% rating for chronic pain. The worker's impairment was minor according to the new Rating Schedule for chronic pain. The worker took good care of himself, had not regressed socially and had normal relations with his family.

Applying a whole person approach, the 15% rating adequately recognized the worker's disability. The level of the worker's disability was not enhanced by the chronic pain.

The appeal was dismissed. However, the Panel directed the Board to consider entitlement to a supplement. [15 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to; Decision No. 915A (1988), 7 W.C.A.T.R. 269 reld to; Decision No. 75/91 reld to
Board Directives and Guidelines: Operational Policy Manual, Documents no. 03-03-03, 03-03-06, 05-03-02; Chronic Pain Disability Policy, Board Minute 2, July 3, 1987, p. 5196

DECISION NO. 116/91 (09/05/91) Signoroni M. Cook (dissenting) Nipshagen

Pensions (lump sum) (amalgamation of claims) - Board Directives and Guidelines (commutation) (retirement) - Commutation (retirement).

A 71 year old retired worker appealed a decision of the Hearings Officer denying commutation of his pension. The worker was receiving a 5% pension for knee disability and a 10% pension for shoulder disability. The worker wanted a commutation of the 5% pension for use as he sees fit, perhaps to buy a cemetery plot. The worker's income exceeded expenses by about \$1,000 per month. In addition, his spouse had monthly income of about \$1,000.

The majority of the Panel found that, for commutation purposes, the pensions should be amalgamated. Since the total of the pensions was greater than 10%, the commutation had to be considered under s. 26 rather than s. 45(4) of the pre-1989 Act.

Since the worker had retired, he could not meet the vocational rehabilitation aspects of the Board policy on commutation. The majority was willing to consider the rehabilitative aspect of commutation in broad terms, including vocational, social and medical perspectives. However, in this case, the request was for financial considerations only.

The appeal was dismissed.

The Worker Member, dissenting, would have paid the 5% pension as a lump sum under s. 45(4). Even under s. 26, the Worker Member would have granted the commutation. Granting the commutation would reduce the worker's worry about his spouse's financial future. [11 pages]

WCAT Decisions Considered: Decision No. 16 (1986), 1 W.C.A.T.R. 62 reld to; Decision No. 146 (1986), 2 W.C.A.T.R. 91 reld to; Decision No. 235/88 (1988), 8 W.C.A.T.R. 347 consd; Decision No. 69/89 (1989), 12 W.C.A.T.R. 172 apld; Decision No. 223/89 (1989), 11 W.C.A.T.R. 302 reld to; Decisions No. 406/87 reld to, 223/89 reld to, 906/90 reld to
Board Directives and Guidelines: Operational Policy Manual, Document no. 05-03-08

DECISION NO. 212/91L (09/05/91) Bigras Jackson Meslin

Leave to appeal (good reason to doubt correctness) (consideration of evidence).

The worker's widow applied for leave to appeal a decision of the Appeal Board denying benefits for silicosis. The Appeal Board found that the worker did not have sufficient exposure.

There was good reason to doubt correctness of the Appeal Board decision. There was evidence that the worker worked in a foundry for sufficient time. It appeared that the Appeal Board failed to verify the period of employment with due diligence.

Leave to appeal was granted. [5 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 04-04-04

**DECISION NO. 239/91I (09/05/91) McIntosh-Janis M. Cook Chapman
Aurini v. Kostur**

Adjournment (additional evidence) - Evidence (affidavits).

The applicants in a Section 15 Application sought to introduce an affidavit at the hearing in lieu of calling as a witness the deponent of the affidavit, who was out of the province. The respondents objected to the Panel accepting the affidavit as evidence establishing that the deponent was a worker in the course of his employment with a Schedule 1 employer at the time of the accident. The respondents were not satisfied that the affidavit unequivocally established these facts.

The applicants must establish the factual basis needed to support their application. In this case, the respondents did not agree to the "facts" presented by the applicants by way of the affidavit. The hearing must be adjourned to permit the applicants to establish those facts either by arranging for the deponent to appear personally or by obtaining an affidavit sufficient to satisfy the respondents that the deponent was in fact a worker in the course of his employment with a Schedule 1 employer at the time of the accident. [5 pages]

DECISION NO. 256/91 (10/05/91) McIntosh-Janis Robillard Sutherland

Continuity (of treatment).

The worker suffered a low back injury in 1966 for which he received benefits for less than two weeks. He received benefits for a recurrence for one month in 1978. The employer appealed a decision of the Hearings Officer granting benefits for one month in 1986.

Considering the minor nature of the accident, ability to return to regular work, gaps in continuity and persuasive medical reports from Board doctors, the Panel found that the worker's back condition in 1986 was not related to the 1966 accident.

The appeal was allowed. However, the Panel referred the matter back to the Board to consider possible disablement from the nature of the worker's employment. [8 pages]

DECISION NO. 269/91 (10/05/91) McIntosh-Janis Shartal Chapman

Withdrawal (of appeal).

The appeal was withdrawn so that the worker could pursue other issues at the Board. [4 pages]

DECISION NO. 272/91 (10/05/91) Faubert Higson Barbeau

Accident (occurrence).

The worker appealed a decision of the Hearings Officer denying entitlement for neck, shoulder and upper back disability, which the worker claimed was related to use of a new machine. The Panel was not satisfied that an accident occurred. There was no strain required to adjust the machine. The worker had preexisting bursitis and osteoarthritis. The appeal was dismissed. [7 pages]

DECISION NO. 901/87(2) (13/05/91) Kenny Higson Nipshagen

Chronic pain - Board Directives and Guidelines (chronic pain) (Rating Schedule) - Pensions (Rating Schedule) (chronic pain) - Pensions (assessment) (chronic pain) - Pensions (Rating Schedule) (comparability of ratings).

The worker appealed confirmation of a 15% pension. The worker suffered a low back injury in 1981. She was awarded a 10% pension in 1983, increased to 15% in 1985. In 1989, the Board determined that the worker was entitled to benefits for chronic pain but found that the 15% pension adequately reflected her overall residual disability.

Applying a whole person concept, the Panel found that the worker had a considerable disability. She had both physical and functional restrictions including sharp pain in the low back radiating to the leg, vomiting, headaches, sleep disturbance, inability to do housework, decrease in sexual involvement, tendency to become upset easily and depression.

Much, if not most, of the worker's disability resulted from psychological or undetected organic sources. Accordingly, she should be rated for chronic pain disability using the new chronic pain Rating Schedule. Applying the Rating Schedule, the worker's disability would be rated at 30%. She had all the features of Category 2 (15% to 25%) plus some of the behaviour described in Category 3. Her whole person impairment was sufficient to be considered at the low end of Category 3.

The Panel then considered whether this rating was consistent with ratings for similar disabilities under other rating schedules and in other Tribunal decisions. If all the worker's disability was from an organic source, it would have been rated at about 30%, comprised of 10% to 15% for restriction of movement and 15% for neurological deficit. If the limitation on daily living activities was considered organic, the overall symptoms may have been considered moderate to severe, warranting a 30% rating. If the disability would have been rated as having an organic component and a psychotraumatic component, it might have been rated at 10% to 15% for organic restriction of movement and in the low to mid range of Category 2 for psychotraumatic disability. The 30% rating was also consistent with other Tribunal decisions.

For retroactivity purposes, the Panel attributed 15% of the pension to organic sources and 15% to chronic pain. Accordingly, the worker was entitled to 15% from 1985 and to an increase to 30% effective March 27, 1986. [26 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 consd; Decision No. 638/89I (1989), 12 W.C.A.T.R. 221 reld to; Decisions No. 901/87 reld to, 901/87(2)I reld to, 23/89 reld to, 28/91 reld to
Practice Directions Considered: Practice Direction No. 9 (1987), 1 W.C.A.T.R. 444
Board Directives and Guidelines: Chronic Pain Disability Policy, Board Minute 2, July 3, 1987, p. 5196; Report on the Changes to the Chronic Pain Disorder Policy, Board Minute 10, October 5, 1990, p. 5398
Cases Considered: Review of Decisions No. 915 and 915A (1990), 15 W.C.A.T.R. 245 (WCB Bd. of Directors) reld to

DECISION NO. 259/90 (13/05/91) Onen Jackson Ronson

Chronic pain.

The worker's assembly line job involved the use of air guns. The worker developed pain in both arms and as a result stopped working in June 1984. At that time, her condition was alternatively diagnosed as tendonitis of the wrists or wrist sprain. By March 1985 there was no longer any evidence of tendonitis or other organic problems. Tests showed no neurological problems. A psychological evaluation did not reveal problems in that area.

The worker was examined for a pension rating in July 1986, but no permanent physical impairment was found. The doctors recommended that she not return to her previous job. The worker returned to light work but in January 1987 her new job was given to another employee with seniority. There was no other light work available. The worker sought further benefits because she continued to experience wrist and forearm pain. The Board did not pay any further benefits as the worker's organic condition had resolved.

The worker continued to suffer pain without physical findings. The medical evidence ruled out fibrositis, but a somatoform disorder was diagnosed. The pain hampered the worker's attempts to return to work and restricted her daily activities such as vacuuming, driving and shopping. The pain complaints started at the time of the work injury and persisted at the same site well beyond the period when the physical injury had healed. The worker was entitled to benefits for a chronic pain disorder beginning in January 1987. [9 pages]

Board Directives and Guidelines: Chronic Pain Disability Policy, Board Minute 2, July 3, 1987, p. 5196

DECISION NO. 522/90 (13/05/91) Signoroni B. Cook Jago

Pensions (Rating Schedule) (chronic pain) - Pensions (assessment) (back) - Pensions (assessment) (whole person concept) - Impairment of earning capacity - Drug abuse - Obesity - Intervening causes (undermotivation).

The worker suffered a compensable low back injury in October 1975. In 1979 he was granted a 10% pension which was increased to 15% in 1984. The issues were whether 15% adequately represented the worker's compensable impairment of earning capacity on an organic basis and whether the worker was suffering from a chronic pain disability which impacted on his impairment of earning capacity.

The Panel found that the worker likely had a pre-existing condition but that it did not produce any significant disability. The employer might thus be entitled to SIEF relief but there was no basis for discounting the worker's entitlement to a pension.

The worker's impairment was predominantly organic and his pension thus should be rated with reference to the benchmarks in the organic rating schedule. It was not appropriate to consider the chronic pain rating schedule in this case.

The worker had become addicted to Demerol which had allowed him to drive long distances for business purposes despite his back condition. The worker managed to discontinue the use of Demerol which was having adverse effects on him. Though the worker's condition remained essentially the same after his discontinuance of the use of Demerol, the Panel found that his resulting greater awareness of pain translated into additional impairment.

The employer argued that the worker's obesity, which was having a negative impact on his medical rehabilitation, should be treated in the same way as a lack of motivation in the context of a search for suitable employment.

The worker was not maintaining his weight in order to maintain his disability. The worker's ability to break his fairly serious Demerol and smoking addictions indicated his commendable motivation. The worker had tried to lose weight, but was unsuccessful. It was unreasonable to expect the worker to deal with all of his problems at once. Failure to co-operate in medical rehabilitation is normally relevant to entitlement to temporary, rather than permanent, benefits. Considering that the worker was overweight prior to the accident, his failure to lose weight was neither an intervening factor nor an example of terminal undermotivation which might lead to a reduction of pension benefits.

The Board's latest assessment rated the worker's disability at 20%, but this took into account only the strictly organic portion of the disability. The worker's disability, assessed on a whole person basis, was greater than this. The worker had pain and limitations of movement in his back and one leg. This impaired his daily activities such as walking, climbing, bending, sitting, lifting and driving. This level of impairment was best represented by the 30% benchmark for total immobility of the low back.

The worker's pension was to be increased from 15% to 30%, effective from the date when the 15% award was initially granted. [9 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to

DECISION NO. 620/90 (13/05/91) McGrath Lebert Howes

Medical examination (section 21).

The worker was not required to attend a medical examination requested by the employer. The examination was not important to achieving the employer's valid compensation goal. There were reports on file which dealt with the worker's psychological condition and there was no apparent inconsistency. The employer could get its own doctor to read these reports and offer an opinion. [4 pages]

WCAT Decisions Considered: 951/88 apld

DECISION NO. 221/91 (13/05/91) Bigras Shartal Meslin

Pensions (assessment) (finger) (amputation).

The worker appealed a decision of the Hearings Officer confirming a 2% pension for amputation of the tip of his ring finger.

The Rating Schedule provides for a 1.2% pension for amputation of a ring finger at the distal joint. The worker's 2% pension appeared to recognize added disability due to reduced grip strength and sensitivity to cold.

The worker lost about two-thirds of the second phalanx of his finger in the amputation. According to the Rating Schedule, the rating should be based on amputation at the proximal phalanx if more than one-quarter of the second phalanx is lost. The Rating Schedule for this is 2.4%, which is 1.2% higher than for amputation at the distal joint. Therefore, the worker was entitled to an additional 1.2% pension. The appeal was allowed. [4 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 05-03-03; Doctor's Manual, Document no. 43-09-27

DECISION NO. 260/91 (13/05/91) Bradbury Rao Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 261/91 (13/05/91) Bradbury Rao Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for one document which was not relevant. [3 pages]

DECISION NO. 281/91 (13/05/91) Bradbury Beattie Preston

Disablement (nature of work).

The worker was a bricklayer. He stopped work in May 1988 due to back pain. The employer appealed a decision of the Hearings Officer granting benefits for disablement.

The worker had significant non-compensable preexisting conditions. He had suffered a fractured neck and brain damage in a motor vehicle accident in 1979. He also had a herniated disc in 1982, for which he underwent surgery. The Board recognized these underlying conditions by granting 50% SIEF relief to the employer. The Panel found that the nature of the worker's work in 1988 was also a significant contributing factor to the onset of disability. The appeal was dismissed. [6 pages]

DECISION NO. 284/91 (13/05/91) Onen Rao Clarke

Access to worker file, s. 77 (issue in dispute) (initial entitlement).

The worker appealed a decision granting access to his file. The issue in dispute was initial entitlement for a low back condition. The worker submitted that the medical reports were not relevant to the

factual dispute of whether an accident occurred. The employer claimed that the worker's condition was due entirely to the prior back problems. The Panel found that the worker's preexisting back condition was relevant.

Access to the worker's file was granted to the employer, except for reports concerning the worker's knee and a subsequent non-compensable condition which were not relevant. [5 pages]

DECISION NO. 293/91I (13/05/91) Bigras Shartal Apsey

Pensions (lump sum) (amalgamation of claims) - Commutation (debt liquidation) (home mortgage) - Referral to Board.

The worker appealed a decision of the Hearings Officer denying commutation of his 5% pension. The worker wanted to commutation for the purpose of debt liquidation.

The worker was also receiving a 20% pension for a different condition. Since the total of the worker's pensions was more than 10%, the Panel considered the appeal under s. 26.

The worker was unemployed. His family expenses far exceeded family income. The commutation would not take the family out of a deficit position. There was no benefit to granting the commutation.

The worker suffered from dyslexia. The Panel requested that the Board consider rehabilitation measures that could be undertaken for the worker. The Panel would then consider the commutation again. [6 pages]

WCAT Decisions Considered: Decision No. 16 (1986), 1 W.C.A.T.R. 62 reld to; Decision No. 69/89 (1989), 12 W.C.A.T.R. 172 apld; Decision No. 386/89 apld

Board Directives and Guidelines: Operational Policy Manual, Document no. 05-03-08

DECISION NO. 299/91 (13/05/91) McIntosh-Janis Robillard Barbeau

Accident (occurrence).

The employer appealed a decision of the Hearings Officer granting benefits to the worker for an upper back disability. The worker gave credible evidence. The Panel found that the accident occurred as described by the worker. The appeal was dismissed. [4 pages]

DECISION NO. 452/90 (14/05/91) Hartman Fox Preston

Consequences of injury (iatrogenic illness) (treatment) - Benefit of the doubt.

The worker underwent surgery for a compensable inguinal hernia in 1971. He had a number of further surgical procedures at the same site over the years. In 1987, the worker underwent surgery for inguinal nerve entrapment. The worker appealed a decision of the Hearings Officer denying entitlement for the 1987 surgery. It was possible that the nerve entrapment occurred during one or more of the surgeries. Applying the benefit of the doubt, the Panel found that the 1987 operation was a sequela of the 1971 hernia operation. The appeal was allowed. [9 pages]

WCAT Decisions Considered: 900/87 reld to

DECISION NO. 48/91 (14/05/91) Moore Higson Nipshagen*Continuity (of complaint).*

The worker suffered a low back strain in October 1976. The worker appealed a decision of the Hearings Officer denying entitlement for a herniated disc in May 1979. Recent medical reports made clear that the worker did not complain of back pain prior to the accident and that she complained frequently after the accident. The reports also supported a causal connection and described the mechanics of development of the disc herniation that was reasonable. The appeal was allowed. [8 pages]

DECISION NO. 216/91 (14/05/91) Faubert M. Cook Meslin*Recurrences (compensable injury) - Intervening causes.*

The worker suffered a compensable low back injury in 1981 and received benefits until his return to work in August 1981. In February 1985, he suffered a low back injury in a non-compensable motor vehicle accident. He returned to work in 1986. The worker appealed a decision of the Hearings Officer denying entitlement for further low back disability in 1989.

On the evidence, the worker never completely recovered from the 1981 accident. The motor vehicle accident resulted in a temporary exacerbation of his condition. His pattern of complaint and treatment following his return to work in 1986 was similar to that recorded prior to the 1985 accident. The Panel was satisfied that the 1981 accident was a significant contributing factor to the worker's disability in 1989. The appeal was allowed. [8 pages]

DECISION NO. 228/91 (14/05/91) Sandomirsky Drennan Chapman*Delay (claim).*

The worker appealed a decision of the Hearings Officer denying entitlement for a wrist injury which the worker related to accidents in February 1980 and January 1984. Considering delay in claiming entitlement until 1985 and inconsistencies in the worker's evidence, the Panel found that the wrist disability was not related to work accidents in 1980 or 1984. The appeal was dismissed. [5 pages]

DECISION NO. 262/91 (14/05/91) Faubert M. Cook Chapman*Access to worker file, s. 77.*

The worker withdrew his objection to access after confusion as to identification of claims was corrected. Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 263/91 (14/05/91) Faubert M. Cook Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 264/91 (14/05/91) Faubert M. Cook Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 857/89 (15/05/91) Carlan Fox Seguin

Independent operator (construction) - Worker (contract of service) (employment relationship) - Board Directives and Guidelines (construction industry worker).

The claimant for compensation benefits appealed a decision holding that he was not a worker at the time of the accident.

The claimant was an unemployed carpenter. The owner of an autobody business engaged the claimant to perform work that would allow the doors of the owner's newly constructed garage to open high enough to allow trucks to enter. The claimant was injured while performing this work.

A Board policy deemed contractors in the construction industry to be workers if they had a relationship with a Schedule 1 employer. Autobody repair is a Schedule 1 industry. However, to be considered an employer under the Act, it is necessary to hire workers. As the owner had no other workers, unless the claimant could establish that he was a worker of the owner at the time of the accident, the owner would not be an employer under the Act. The Board policy thus would not be applicable as there was no Schedule 1 employer.

The claimant had been an independent contractor engaged on a part-time basis doing carpentry work but his last job, prior to his current period of unemployment, was as a driver. Following the accident, the claimant had described himself to a Board investigator as a self-employed contractor.

The Panel found that the claimant was an independent operator rather than the worker of the owner. He was paid to perform a time-limited job with no expectation of a continuing relationship with the owner. The work was controlled by the worker and it did not form an integral part of the owner's business. As the claimant was not the worker of the owner, the above-mentioned policy did not apply because there was no Schedule 1 employer.

However, a second policy provided that independent operators in the construction industry, including structural carpenters, would be deemed to be workers. One of the exceptions to this second policy was door installers. The claimant was properly classified as a carpenter rather than as an installer. His skills extended beyond merely installing doors. The work he was hired to do was carpentry work, including cutting the existing beams to enlarge the door area. By virtue of this policy, the claimant was a worker at the time of the accident and was thus entitled to benefits under the Act. [7 pages]

WCAT Decisions Considered: Decision No. 226/89 (1989), 11 W.C.A.T.R. 307 *reld to*; Decision No. 921/89 (1990), 14 W.C.A.T.R. 207 *reld to*

Board Directives and Guidelines: Claims Services Division Manual, s. 1(1)(z), p. 19, Directive 1; Claims Adjudication Branch Procedures Manual, Document no. 33-02-26

DECISION NO. 884/89 (15/05/91) Hartman Fox Meslin

Consequences of injury - Medical opinion (disc, degeneration) (cervical lumbar syndrome) - Disc, degeneration (cervical).

The worker suffered a compensable low back strain in February 1973 for which he was awarded a pension. The worker began to notice cervical symptoms in the fall of 1974. These were minor and not disabling. The focus of treatment was always the low back. Assuming that the cervical symptoms did at some point become disabling, the issue was whether the low back strain was a significant contributing factor. The worker claimed that he altered his posture as a result of the 1973 accident and that this, superimposed on the degenerative changes in his cervical spine, caused the disability.

The medical reports could be read as supporting the existence of the theory of "cervical lumbar syndrome" whereby injury to one segment of a spinal column will involve other segments if they are potentially symptomatic areas. However, the reports did not assist in applying the theory to the facts of this case. Even the doctor on whose reports the worker relied, was clear that the 1973 accident was not the cause of degenerative changes in the lumbar or cervical spine of the worker. He felt that the lumbar symptoms were due to poor abdominal musculature and posture which, if corrected, would decrease both lumbar and cervical pain. The worker's argument about the change in posture due to the accident was highly speculative.

The worker's low back strain was not a significant contributing factor in the onset of cervical spine symptoms. [11 pages]

WCAT Decisions Considered: Decision No. 884/89L reld to

DECISION NO. 304/90 (15/05/91) Moore Ferrari Jago

Dupuytren's contracture - Medical opinion (Dupuytren's contracture).

The worker had Dupuytren's disease. The Panel found that this condition did not arise out of and in the course of the worker's employment. On the evidence, the Dupuytren's disease was the result of the worker's diabetes. The worker's Dupuytren's disease had not been precipitated or aggravated by his work.

There was an inconsistency between the medical evidence in this case (that Dupuytren's disease is not aggravated by work) and the conclusions contained in some prior Tribunal decisions. In this case, there was no evidence to support the argument that the worker's Dupuytren's disease resulted from a work-related accident, but there was substantial evidence that the condition did not arise out of the employment. It was thus unnecessary to reconcile the apparent inconsistency, for the purposes of this decision. [7 pages]

WCAT Decisions Considered: Decision No. 304/90I reld to

DECISION NO. 214/91 (15/05/91) McGrath Robillard Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 253/91 (15/05/91) Newman Jackson Jago
Pilon v. LaFlamme

Section 15 application - Withdrawal (of application).

The civil action was settled and the s. 15 application was withdrawn. [5 pages]

DECISION NO. 257/91 (15/05/91) Newman Jackson Jago

Delay (treatment) - Preexisting condition (arthritis) - Rheumatoid arthritis.

The worker appealed a decision of the Hearings Officer denying entitlement for generalized rheumatoid arthritis, which the worker related to an accident in 1987.

There was a delay in seeking treatment for 13 months. The accident, in which the worker's hand was jammed against a wall, was minor. The worker had a preexisting arthritic condition. The medical evidence in the case did not support a causal connection between the accident and development of rheumatoid arthritis. It was theoretically possible for there to be a causal connection but such a connection was not established in this case.

The appeal was dismissed. [7 pages]

WCAT Decisions Considered: Decision No. 470 (1990), 15 W.C.A.T.R. 1 reld to; Decision No. 936/87 reld to

DECISION NO. 404/90 (16/05/91) Kenny Higson Meslin

Continuity (of symptoms) - Preexisting condition (disc, degeneration).

The worker suffered compensable low back strains in 1982 and 1984. The worker appealed a decision of the Hearings Officer denying entitlement for back problems in 1986.

X-rays taken at the time of the 1982 accident showed that the worker already had degenerative disc disease. Considering lack of continuity of symptoms, the Panel found that the 1982 injury resolved. There was some evidence of continuing back problems after the 1984 accident. However, this was also consistent with progression of the non-compensable degenerative disc disease. Medical opinions indicated that the two accidents caused sprains, which were not likely to lead to disc problems.

The Panel concluded that the problems in 1986 were not related to the compensable accidents. The appeal was dismissed. [10 pages]

DECISION NO. 40/91 (16/05/91) Hartman Lebert Apsey

Penalties - Board Directives and Guidelines (penalty assessments) (improved record).

The employer appealed a decision of the Hearings Officer confirming a penalty assessment for the years 1984-86. The employer submitted that the penalty should be rescinded on the basis of steps taken to improve safety in the workplace.

On the evidence, there was no improvement in safety until 1990. There was very little health and safety training until 1989 and 1990. The Panel could not find reason to rescind the assessment. The appeal was dismissed. [9 pages]

WCAT Decisions Considered: Decision No. 598/87 (1987), 6 W.C.A.T.R. 183 *reld to*; Decision No. 845/88 (1989), 11 W.C.A.T.R. 154 *reld to*; Decision No. 974/88 (1988), 10 W.C.A.T.R. 345 *reld to*; Decision No. 256/87 *reld to*
Board Directives and Guidelines: Operational Policy Manual, Document no. 08-06-05; Additional Assessments Policies and Procedures, Board Minute 6, January 14, 1975, p. 4419

DECISION NO. 46/91 (16/05/91) Hartman Ferrari Jago

Medical examination (section 21).

The worker had suffered a neck strain in October 1989. She returned to modified work, but in 1990 she claimed seven recurrences. In October 1990, the employer requested that the worker attend a medical examination with a doctor selected by the employer. The worker objected as her doctor had been filing monthly assessment forms with the employer and further forms whenever there was a recurrence. The employer had also received the report of another doctor with respect to the worker's capabilities.

The employer had an extensive modified work program. Usually, receiving the treating doctor's monthly reports provided sufficient information. However, in this case, because of the repeated recurrences and the length of time on the program, the employer wished a medical opinion as to whether the worker's modified work program was appropriate, or whether the worker should be placed in a different program.

Given the repeated inability of the worker to advance to the performance of her regular duties, an independent assessment was appropriate to address the stated compensation goal of determining the worker's restrictions. The worker was directed to attend a medical examination with a doctor selected by the employer. [5 pages]

DECISION NO. 139/91 (16/05/91) Chapnik Ferrari Preston

Disablement (repetitive work).

A refuse collector appealed a decision of the Hearings Officer denying entitlement for a right knee condition. The Panel found that the worker's condition was a disablement from the repetitive nature of his job, in which he stepped down off the garbage truck and pivoted. The worker would do this for half of the day, or about 750 times. The other half of the day, the worker drove the truck, with continual stopping and starting, using his right foot on the accelerator and brake pedals.

The appeal was allowed. [8 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-01-02; Claims Services Division Manual, s. 1(1)(a), p. 1, Directive 2; Interpretation Bulletin - Interpretation of "Personal Injury by Accident", "Chance Event", and "Disablement", Policy and Program Development Department, October 19, 1988

DECISION NO. 215/91L (16/05/91) McGrath Robillard Preston

Leave to appeal (good reason to doubt correctness) (evidence to support Appeal Board conclusion).

The worker applied for leave to appeal a decision of the Appeal Board denying continuing entitlement. There was evidence to support the Appeal Board conclusion that ongoing problems were not related to the compensable accident.

Leave to appeal was denied. [6 pages]

DECISION NO. 244/91 (16/05/91) McCombie Drennan Ronson

Continuing entitlement.

The worker slipped and fell on her knees in February 1987. The worker appealed a decision of the Hearings Officer denying entitlement for ongoing knee problems, diagnosed as synovial plica.

On the evidence, the worker had continuing problems after the accident, although she was able to continue working due to the nature of her job. The appeal was allowed. [6 pages]

WCAT Decisions Considered: 616/88 reld to, 184/90 reld to

DECISION NO. 245/91I (16/05/91) Robeson Lebert Chapman

Adjournment (referral to Board).

The worker appealed a decision of the Hearings Officer denying continuing entitlement. The Panel found that the Hearings Officer decision included a final decision denying entitlement for chronic pain. However, there was insufficient material in the file for the Panel to deal with the issue of chronic pain.

The hearing was adjourned. The matter was referred to the Board to investigate the issue of chronic pain, after which the hearing would resume. [6 pages]

DECISION NO. 297/91I (16/05/91) Bradbury B. Cook Meslin

Three week rule (witnesses).

The employer brought two witnesses to an appeal but had not given notice as required by the three week rule. The Panel decided that it would want to hear the evidence of these witnesses. The hearing was adjourned to allow the worker to prepare for cross-questioning. [3 pages]

DECISION NO. 412/90 (17/05/91) Kenny Robillard Clarke

Access to worker file, s. 77 (harmful information).

The Panel obtained an opinion from a Board consultant regarding release to the employer of a report that

had been withheld pursuant to s. 77(2). The Panel found that the report was relevant to the issue in dispute. Access to the report was granted to the employer. [4 pages]

WCAT Decisions Considered: 412/901 reld to

DECISION NO. 687/90 (17/05/91) Hartman McCombie Sutherland

Continuing entitlement.

The worker suffered a sprained shoulder at work in March 1985. A Board doctor determined that she had returned to her pre-accident level in November 1985. The worker attempted to return to work but was unable to continue.

The Panel found that the worker was not entitled to benefits after November 1985. The orthopaedic specialist and Board doctor did not confirm the family physician's suspicion of the development of rotator cuff tendonitis. The worker's course of medical treatment did not indicate a flare-up of the worker's condition following November 1985. During this period, the worker continued to be treated for a lung condition which was the subject of Canada Pension Plan applications. Her inability to return to work was due to non-compensable factors. [8 pages]

DECISION NO. 133/91 (17/05/91) Moore Shartal Apsey

Second Injury and Enhancement Fund (severity of preexisting condition) - Second Injury and Enhancement Fund (psychological condition) - Board Directives and Guidelines (SIEF) (psychological condition).

The employer appealed a decision of the Hearings Officer confirming 50% SIEF relief for a minor accident. The employer submitted that the worker's preexisting condition was moderate, within the Board guidelines, considering her preexisting degenerative back condition, underlying psychological vulnerability and obesity.

On the evidence, the preexisting back condition was minor. Medical reports made reference to obesity but did not refer to it as a factor which prolonged or worsened the worker's overall disability.

The Board policy on preexisting psychological conditions does not require a preexisting impairment or disability. However, the Panel found that there must be some evidence of the presence of the preexisting psychological condition prior to the compensable accident. In this case, symptoms were not apparent prior to the accident. Any psychological condition that existed before the accident had a minimal effect on the worker's life and added little or nothing to the overall degree of preexisting impairment.

The Board was correct in finding that the worker's preexisting condition was minor. The appeal was dismissed. [8 pages]

WCAT Decisions Considered: 186/91 consd

Board Directives and Guidelines: Claims Services Division Manual, s. 108(2), p. 235, Directive 1

DECISION NO. 137/91 (17/05/91) Chapnik Ferrari Preston*Accident (occurrence).*

The worker appealed a decision of the Appeals Adjudicator denying entitlement for bilateral knee disability. On the evidence, the Panel found that the worker suffered three separate knee injuries at work in 1984. The accidents aggravated preexisting osteoarthritis. The appeal was allowed. [7 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 *reld* to

DECISION NO. 172/91 (17/05/91) Hartman Robillard Apsey*Delay (onset of symptoms).*

A machine operator suffered a low back injury in a compensable accident in March 1987. The employer appealed a decision of the Hearings Officer granting entitlement for neck, shoulder and arm conditions, which the worker claimed were also suffered in the accident.

There was a three week delay in reporting the neck, shoulder and arm conditions. However, this was not critical. The worker's description of the accident was consistent with soft tissue injury in the upper body as well as the low back.

The appeal was dismissed. [7 pages]

DECISION NO. 280/91 (17/05/91) Newman Lebert Sutherland

Wright v. Atkins

Section 15 application - In the course of employment (lunch) - In the course of employment (travelling).

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken away. The issue was whether the plaintiff was in the course of employment at the time of a motor vehicle accident.

The plaintiff was a nurse, who performed in-home nursing services. After seeing her morning list of patients, she called the office from a patient's home, to say that she was going for lunch. She was involved in the accident while going home for lunch.

Driving was an essential part of the plaintiff's job. She was driving the employer's vehicle and carrying the employer's equipment. However, the Panel found that the worker was not in the course of employment, based on the combination of a number of factors: the plaintiff had informed her employer that she was going for lunch, in effect saying that she was going to be off duty; she was not paid for lunch; the decision to go home for lunch took her on a path of travel different from her work related route; by going home she took advantage of an opportunity to return to the scope and functions of personal life.

Since the plaintiff was not in the course of employment, her right of action was not taken away.

[8 pages]

DECISION NO. 285/91 (17/05/91) McCombie Lebert Shuel

Access to worker file, s. 77.

Access to the worker's file was granted to the employer.

The Panel noted that the issue in dispute related to entitlement for a psychological condition. The medical evidence also involved the worker's wife, who was a worker in the same workplace. The Panel emphasized the requirement of confidentiality in such circumstances. [4 pages]

DECISION NO. 580/87RI (21/05/91) Bigras Robillard Barbeau

Reconsideration (new evidence) - Reconsideration (error of facts) - Ombudsman.

The Tribunal decided, on its own motion, to hold a hearing to determine the advisability of reconsidering Decision No. 580/87. The Tribunal did so after receiving a letter from the Ombudsman stating that new medical evidence had been discovered which led the Ombudsman to tentatively conclude that the original decision was arrived at on insufficient evidence.

In the original decision, the Panel found that the worker was in the course of her employment when a sexual assault was alleged to have taken place. However, the majority of the Panel denied entitlement on the basis that the worker's reporting of the injury led to the conclusion that there was no causal relationship between the alleged assault and the worker's shoulder injury.

The original Hearing Panel had found that the worker did not report her shoulder injury on her first visit to her family doctor after the alleged assault. There was new evidence available, in the form of a letter from the worker's family doctor, to the effect that the worker had reported a shoulder injury on that visit and that she had attributed the injury to an assault.

The majority of the original Panel had found that the worker was being treated for arthritis at the time that she alleged to be receiving treatment for her shoulder injury. Another letter from the family doctor showed that the worker was prescribed medication for inflammation of her shoulder, rather than for arthritis.

The majority of the original Panel had found that the worker's job involved heavy lifting. The reconsideration Panel found that finding to be incorrect, based on the evidence adduced by the worker and her supervisor at previous hearings.

These three erroneous findings constituted sufficient reason to doubt the correctness of the original decision. They undermined the conclusion that there was no relationship between the injury and the work. The request for reconsideration was granted. The matter was to be re-opened and a hearing held on its merits. [11 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decision No. 850/87R (1990), 14 W.C.A.T.R. 1 reld to; Decision Nos. 72R reld to, 72R2 reld to, 580/87 reld to

DECISION NO. 885/90 (21/05/91) Hartman McCombie Shuel

Access to worker file, s. 77 (use of material).

Access to the worker's file was granted to the employer. Due to the worker's concerns about the employer's use of the material, the Panel directed the Board to release the documents directly to the

employer's occupational health and safety department after receiving a written undertaking to notify the worker and the Board prior to any further disclosure. [5 pages]

DECISION NO. 740/90I2 (22/05/91) Moore B. Cook Barbeau

Psychotraumatic disability - Maximal medical rehabilitation - Jurisdiction, Tribunal (final decision of Board) - Referral to Board.

The worker suffered a back injury in February 1985. She received temporary total disability benefits from February 1985 to August 1985 and again from December 1985 to January 1986. In December 1986 she was granted a 15% pension. In a previous interim decision, the Panel had found that the worker was entitled to benefits for a work-related psychiatric disability.

The starting date for benefits for the psychiatric disability should be August 1985. At that time the worker had just been discharged from HRC. Reports made while the worker was at HRC referred to gross psychogenic presentation and the need for involvement by the Board's psychiatric assessment unit.

The worker's psychiatric condition reached maximum medical rehabilitation in January 1986, the date of her discharge from the Board's psychiatric assessment unit. At that point the presence of a significant psychiatric disability, that had little chance of significant improvement, was indicated. Mention in medical reports of improvement in sleeping patterns, or increased participation in household activities, were not the kind of significant improvement which would indicate that maximum medical rehabilitation had not yet been reached. Maximum medical rehabilitation does not require that the worker's condition be static. The question is whether the worker's condition has a reasonable chance of improving. In this case, the reports indicated that the worker had settled into a role of permanent invalidism.

The worker thus was entitled to a pension for her psychiatric condition commencing in January 1986. She was entitled to temporary total benefits between August and December 1985.

The Panel had the jurisdiction to determine the worker's level of permanent impairment from her psychiatric disability. The issue arising from the Hearings Officer's decision was entitlement to benefits for a disabling non-organic condition. Once the Panel had found entitlement to benefits, the nature of that entitlement was a reasonable corollary issue. However, not allowing the Board an opportunity to assess the worker's level of impairment first, would deprive the Panel of the benefit of important expert evidence and thereby risk making a decision not based on the real merits and justice of the case. The Board should rely on the guidelines in its Psychotraumatic and Behavioural Disorders Rating Schedule as the principal benchmark for assessing the worker's level of impairment. [9 pages]

WCAT Decisions Considered: Decision No. 638/89I (1989), 12 W.C.A.T.R. 221 apld; Decision Nos. 393/8I2 apld, 740/90I reld to Board Directives and Guidelines: Operational Policy Manual, Document nos. 03-03-03, 05/03/11

DECISION NO. 152/91 (22/05/91) Sandomirsky Lebert Nipshagen

Rehabilitation, vocational (academic training) - Board Directives and Guidelines (rehabilitation) (training).

The employer appealed a decision of the Hearings Officer granting sponsorship for a Bachelor of Education programme in 1988.

The worker was a postal clerk in 1978 when she suffered a back injury for which she was awarded a 10% pension. She was unable to return to work as a postal clerk. The Board suggested retraining in a

secretarial programme at a community college. The worker decided to attend university at her own expense. In 1985, she graduated with a Bachelor of Arts. She then contacted the Board's vocational rehabilitation department and requested assistance. Programmes suggested by the Board were unsuccessful. She then pursued her own programme which was also unsuccessful. In 1988, the worker enrolled in the university programme to obtain her teaching degree.

There are no time limits under s. 54. The worker met the general requirements for vocational rehabilitation assistance. She could not return to her work as a postal clerk. She did not disqualify herself from receiving rehabilitation benefits by failing to accept suitable employment, as there was no evidence that the employer was willing to offer permanent modified work. Further, she was not disqualified for receiving extensive rehabilitation services without benefit. Many of the programmes undertaken by the worker were on her own initiative, rather than as a result of Board sponsorship. In addition, her educational upgrading resulted in significant career benefit.

The worker also met the eligibility requirements for a formal academic training programme: she could not return to her former employment and placement in other suitable employment did not prove to be possible; she had an aptitude for the programme she chose; formal training was necessary to achieve the vocational goal of becoming a teacher; on-the-job training was tried twice, unsuccessfully.

Board rehabilitation policy provides for facilitating the re-entry of the worker into the work force as closely as possible to the pre-accident socio-economic level. The Panel agreed with Decision No. 112 that not only must the actual pre-accident employment be considered but, also, other evidence of actual vocational potential. In this case, the Panel found that, in 1988, after having completed a university degree, the worker's potential had moved beyond the possibilities that existed in 1979. That fact should not prevent her from being trained as a teacher when other forms of vocational assistance have proven to be unsuccessful.

The worker's unilateral decision to go to university rather than secretarial college should not prevent her from being sponsored for the teaching degree. In this case, the worker sought further specialized training so that she could best utilize her self-funded university education. This differed from Decision No. 375/89, where a worker sought support for his university education.

The appeal was dismissed. The worker was entitled to sponsorship for the teaching degree. [10 pages]

Ss: 54

WCAT Decisions Considered: Decision No. 112 (1986), 3 W.C.A.T.R. 54 apld; Decision No. 375/89 (1989), 11 W.C.A.T.R. 336 distd
Board Directives and Guidelines: Claims Services Division Manual, s. 54, p. 186, Directive 2; Vocational Rehabilitation Division Manual, Document no. 02-01-03

DECISION NO. 175/91 (22/05/91) McGrath B. Cook Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for one letter and one sentence that were not relevant. [3 pages]

DECISION NO. 323/91 (22/05/91) McCombie Shantal Barbeau

Recurrences (compensable injury) - Intervening causes.

A nurse suffered a low back sprain in August 1985 while moving a patient. She was off work for one year as a result. In March 1987, the worker stopped working again. The worker appealed a decision of the Hearings Officer denying entitlement in 1987.

The Hearings Officer found that there was continuity of symptoms following the worker's return to work in August 1986 but that an incident at home, when the worker lifted her child, was an intervening event that broke the chain of causation. The worker related the recurrence to an incident at work when she was carrying some equipment. The Panel found that the incident at home was relatively trivial and could not constitute an intervening cause. Both incidents were aggravations of the underlying condition which originated from the 1985 accident.

The appeal was allowed. [7 pages]

DECISION NO. 343/91 (22/05/91) McCombie Ferrari Clarke

Available employment (offer from accident employer).

The worker suffered a low back injury in October 1988. The worker and employer both appealed a decision of the Hearings Officer granting 50% benefits from January 1990 to June 1990.

On the evidence, the worker was temporarily partially disabled during the period in question and made very little effort to rehabilitate himself. However, he did not refuse suitable employment or make himself unavailable for employment. The employer would have tried to accommodate the worker had he come to work. The employer attempted to contact the worker by telephone but made no further efforts about work either by mail or through the Board. Therefore, the worker would not have been aware of the availability of suitable work.

The appeals were dismissed. [9 pages]

WCAT Decisions Considered: Decision No. 137 (1987), 4 W.C.A.T.R. 87 consd

DECISION NO. 692/89 (23/05/91) Starkman B. Cook (dissenting) Preston

Psychotraumatic disability - Procedure (section 86h) (question of fact) - Words and phrases (fact, s. 86h) - Causation (medical evidence).

The worker cut off the tip of his index finger in a January 1982 work accident. He had not returned to work since the accident. The worker was awarded a .4% pension in August 1983. He continued to complain of pain in his hand and arm. He was unable to engage in the normal activities of daily living. No organic basis could be found for the pain and doctors were able to find a full range of motion in the worker's hand.

Two psychiatric opinions were before the Panel. One supported a relationship between the worker's psychological disability and the work accident. The other made some comments to the effect that the worker's disability was related to the accident but ultimately was unsupportive of the worker's right to an award for a psychological disability.

The majority of the Panel found that the worker had a psychological disability, but concluded that the

work accident was not a significant contributing factor. It found persuasive the analysis of the second psychiatric opinion which considered: the murder of the worker's daughter in 1985 was an intervening event of such importance so as to break the chain of causation; post-accident psychotraumatic disabilities are mostly of limited duration; the worker had secondary gain factors and a regressive attitude; and, the worker's questionable motivation for rehabilitation.

The majority felt that further medical assessment under s. 86h was unwarranted. Referral of the worker to another psychiatrist would invite a further opinion as to the causal relationship between the accident and the worker's disability. Such a decision should be made by the Panel and not delegated to medical practitioners.

Only questions of fact can be referred under s. 86h. The worker's condition is a question of fact. The relationship between the condition and the accident and whether the condition is compensable, is a question of law. This is not a simple matter of counting the medical reports on file to find a majority opinion. It is the responsibility of a panel to review the reports and to determine whether it has been demonstrated, on a balance of probabilities, that the claim is compensable.

The Worker Member, dissenting, would have found that the worker's psychological disability resulted from the work accident. The daughter's death occurred more than three years after the accident. The worker's psychological disability was completely entrenched by that time.

The Worker Member viewed both psychiatric opinions as connecting the disability to the work accident. He read the opinion relied on by the majority as stating that even when there is a clear link between the psychological disorder and the compensable accident, the worker should not be compensated, based on purely therapeutic reasons.

There was no evidence, medical or otherwise, that the disability was not related to the work accident. This was not the case of the majority preferring some evidence over other evidence. Expert evidence should not be discarded simply because it does not accord with an adjudicator's own belief, particularly where it is the only evidence available. The Tribunal's remedy, when faced with inadequate medical evidence, is resort to s. 86h. The question of the likelihood of an injury, such as that sustained by this worker, causing the sort of disability present in this worker, is a question of medical "fact" within the meaning of s. 86h.

As the evidence of the two qualified psychiatrists was unanimous that the disability resulted from the accident, there was no reason not to accept it. At the very least any doubts about the validity of their conclusions should have been expressed to a section 86h assessor to see if the doubts are valid. [15 pages]

Ss: 86h

Board Directives and Guidelines: Operational Policy Manual, Document no. 03-03-03

DECISION NO. 460/90 (23/05/91) Carlan B. Cook Nipshagen

Heart attack - Presumptions (section 3).

The worker appealed a decision of the Hearings Officer denying entitlement for a heart attack which occurred at work. The worker worked in the laundry at a hospital. The work was moderately heavy. The worker claimed that the heart attack was caused by heavy work.

There were a number of medical opinions, some of which supported a relationship to work and some which did not support such a relationship. Applying the standard test of balance of probability, an employment connection could not be established. However, applying the presumption in s. 3, the Panel found that there was not sufficient evidence to establish an alternative diagnosis. The presumption was not rebutted.

The appeal was allowed. [10 pages]

DECISION NO. 229/91 (23/05/91) Newman M. Cook Jago

Pensions (assessment) (back) - Pensions (assessment) (psychotraumatic disability) - Aggravation (preexisting condition) (passive/aggressive personality disorder).

The worker suffered a low back injury in 1983 for which he was awarded a 15% pension for organic disability. He was also awarded a 10% provisional pension for psychiatric disability. The worker appealed the level of the pension.

On the evidence, the Panel found that the 15% award for organic disability adequately recognized the worker's mild to moderate back disability.

The preponderance of medical evidence regarding the psychiatric condition was that the worker suffered from preexisting passive/aggressive personality disorder. Even the Board doctor who assessed the 10% provisional pension was of the view that the condition was not work related. He was only advising of the rating should the condition be found to be compensable. The only supportive medical opinion was not persuasive since it did not consider the preexisting personality disorder. The Panel found that the preexisting disorder was aggravated by the accident. The 10% provisional award adequately recognized the degree to which the accident aggravated the condition.

The worker also suffered injuries in an assault that was not work related. The worker claimed his injuries were more severe due to the compensable accident. The Panel found that, even if the worker were completely able-bodied, he would have been unable to defend himself from the surprise attack and that his injuries would have been as severe.

The appeal was dismissed. [13 pages]

DECISION NO. 288/91I (23/05/91) Moore B. Cook Jago

Access to worker file, P. D. 1 (issue in dispute) (re-employment).

The worker objected to release of information in the Case Description to the employer. The employer was appealing a decision of the Reinstatement Officer assessing a penalty for failure to offer the worker his pre-accident employment. The worker submitted that documents after the date that the pertinent events occurred were not relevant.

The Panel found that the documents were relevant. The hearing panel would likely have to consider ability to work after the date in question. Also, subsequent medical evidence would likely shed light on the worker's condition at the time in question and after that time for the purpose of determining whether the employer should have offered employment at a later date.

Access was granted to the employer. [5 pages]

WCAT Decisions Considered: 828/90I apld

DECISION NO. 308/91 (23/05/91) Moore B. Cook Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 132/91 (24/05/91) Signoroni M. Cook Chapman
Ontario (Liquor Control Board) v. Smith

Section 15 application (action for breach of contract) - Words and phrases (action, s. 14).

The worker was injured while operating a pallet mover in the course of carrying out his employment duties. His employer was a Schedule 2 employer. The issue was whether the worker's action against the employer was taken away by s. 14 of the Act.

The worker framed his action in contract, claiming that the employer breached an implied term of the contract of employment by failing to provide adequate training in the operation of the employer's machinery. The worker argued that his right of action did not arise "for or by reason of any accident" within the meaning of s. 14. He argued that though an accident did occur, his right of action arose in contract law independent of the accident.

Not all rights of action are taken away by s. 14. For instance an action for wrongful dismissal would not be affected by s. 14. However, in this case there was an employment-related accident and the damages claimed in the action flowed from the employment-related accident sustained by the worker.

The result of an interpretation of s. 14 that would take away tort actions, but not those framed in contract, could not be considered reasonable.

The worker's right of action against his employer was taken away by s. 14, regardless of whether the right of action was framed in contract or in negligence, because the right of action was exercised "for or by reason of" the worker's employment-related accident. [8 pages]

Ss: 14

WCAT Decisions Considered: Decision No. 432/88 (1988), 9 W.C.A.T.R. 306 consd

Cases Considered: Kamloops (City) v. Neilsen, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641 (S.C.C.) *reld to*; Consumers' Glass Co. Ltd. v. Foundation Co. of Canada (1985), 51 O.R. (2d) 385 (Ont. C.A.) *reld to*; Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147 (S.C.C.) *reld to*

DECISION NO. 204/91 (24/05/91) Bigras M. Cook Shuel

Pensions (assessment) (knee) - Aggravation (preexisting condition) (osteoarthritis) (knee) - Subsequent incidents (outside work) - Intervening causes - Apportionment (pensions) - Benefit of the doubt.

The worker suffered a torn meniscus and aggravated preexisting asymptomatic osteoarthritis of the left knee in an accident in 1977. He underwent a medial meniscectomy and osteotomy. In 1979, he was awarded a 10% pension. In 1985, he suffered a further knee injury in a serious non-compensable motor vehicle accident. In 1990, he underwent full left knee replacement. The worker appealed a decision of the Hearings Officer denying an increase in his pension.

The Panel found that, between 1979 and 1985, the worker's knee condition deteriorated. This conclusion was based on medical expectations of further problems, evidence of increasing pain, increase in the osteoarthritic condition and application of the benefit of doubt to the issue of whether reduced flexion occurred prior to or after the 1985 accident. The worker was entitled to an increase of his pension from 10% to 15%.

The worker claimed increased benefits after 1985 to cover the increased disability which could be apportioned to the sequelae of the compensable accident. The Panel found that the worker was not entitled to additional benefits. Without the motor vehicle accident, the worker would have been able to continue working. With time, his condition would have deteriorated gradually but there was no way of estimating how

long it would have taken to reach the stage he is at now. Considering the rapid acceleration of the osteoarthritis symptoms in both legs and hips after the motor vehicle accident, the Panel found that the motor vehicle accident was responsible for the increased disability. The motor vehicle accident was an intervening event which broke the chain of causation between the compensable accident and the disability.

The appeal was allowed in part. [15 pages]

WCAT Decisions Considered: Decision No. 342 (1986), 3 W.C.A.T.R. 135 consd; Decision No. 915 (1987), 7 W.C.A.T.R. 1 consd; Decision No. 79/87 (1987), 6 W.C.A.T.R. 104 consd

DECISION NO. 206/91 (24/05/91) Bigras Jackson Barbeau

Disablement (strenuous work).

The worker stopped working in May 1986 due to shoulder and wrist problems. She returned to work as a meat trimmer in January 1987 but stopped work again in March 1987. She was awarded further benefits for shoulder and wrist problems but was denied benefits for a back condition which required surgery in November 1987. The worker appealed a decision of the Hearings Officer denying entitlement for the back condition.

On the evidence, the worker performed heavier work after her return to work in January 1987. The Panel found that the back condition was a disablement arising from the nature of the worker's work.

The appeal was allowed. The worker received benefits until July 1988 for the shoulder and wrist problems. The matter was referred to the Board to determine any further benefits resulting from this decision. [9 pages]

DECISION NO. 1126/87I2 (27/05/91) Kenny Lebert Seguin

Procedure (disclosure of evidence).

The employer appealed a decision extending the period for which the worker was entitled to benefits. The employer argued that the subsequent disability resulted from injuries sustained in car accidents. The employer asked for pre-hearing production of material relating to the car accidents, but the worker objected. In a prior decision, the Tribunal had ordered that certain material be produced.

The Panel examined the material and provided the worker with a list of documents which it felt were relevant. These included medical records, notes and reports; a police report; excerpts from the examination for discovery; and the statement of claim. The worker objected to the release of documents, or portions of documents, that dealt with the worker's emotional response to the car accidents and to release of the portion of the statement of claim dealing with the worker's financial claim.

The Panel decided to release the documents to the employer with deletions of those portions pertaining to the worker's emotional state. The question as to the relevancy and release of the deleted portions should be left to the Hearing Panel after it has determined what are the issues on appeal. However, there was no reason to delete the financial portion of the statement of claim. It was a matter of public record that did not involve private medical information.

The employer should be provided with the worker's submissions regarding disclosure of documents, so as to be in a position to make further argument before the Hearing Panel on an informed basis. [6 pages]

WCAT Decisions Considered: Decision No. 1126/87I reld to

DECISION NO. 350/91 (27/05/91) Signoroni Beattie Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 351/91 (27/05/91) Signoroni Beattie Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. The worker objected to release of the reports to a consulting company. The consulting company was the employer's representative. As such, the consultant was entitled to access to the same evidence as the employer. [3 pages]

DECISION NO. 354/91 (27/05/91) Onen Beattie Sutherland

Medical examination (section 21).

The employer's application for an order requiring the worker to attend a medical examination was denied. The employer was not disputing entitlement. There was no current dispute as to the worker's ability to return to work. The employer wanted the medical examination pursuant to its policy of requiring medical examinations. There was no valid compensation goal. [4 pages]

DECISION NO. 356/91 (27/05/91) Onen Beattie Sutherland

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

**DECISION NO. 436 (29/04/87) Newman Heard Jago
Rocha et al. v. Yanez et al.**

Section 15 application - In the course of employment (distinct departure test) - In the course of employment (travelling) - Executive officers - Charter of Rights - Dependents - Collective agreement.

The plaintiffs (the estate and dependants of the deceased worker) applied to determine whether their right of action was taken away. The worker was injured and later died as a result of a motor vehicle accident while returning to Toronto from Montreal, in a company truck driven by one of the defendants, after completing a work assignment in Montreal. The defendants were the employer company, executive officers of the company and the driver.

The Tribunal was of the view that the Supreme Court of Canada decision in *Workmen's Compensation Board v. C.P.R.* and *Noell* encouraged an analysis of each set of facts for the purpose of determining whether the

worker was only enjoying a privilege which arose out of the contract or was performing an activity which was an incident of the contract. The Tribunal decided that the totality of the event should be considered to determine whether the activities of the worker were reasonably incidental to the employment or whether they represented a distinct departure from the scope of employment. As to the scope of employment, the Tribunal must balance all the factors to determine whether the worker was in the course of the employer's employment of workers.

On the evidence, the deceased was in the course of his employment. The driver, a regular worker of the employer, was also in the course of his employment, even though he was not classified as a "driver" under a collective agreement. Even if there was violation of the collective agreement, it was not sufficient to remove the driver from the scope of his employment.

The right of action against the executive officers was not taken actively to the time of the accident. However, under s. 8(11) the executive officers would be liable only for their own negligence. One of the plaintiffs was a son-in-law of the deceased and did not come within the definition of "dependants" in the Act. His right of action against the employer and the driver was not taken away. The right of action of the other plaintiffs against those defendants was taken away. Section 15 of the Charter of Rights did not apply retroactively to the facts of this case.

Ss: 15, 8(9), 8(11)

WCAT Decisions Considered: Decision No. 123 (1986), 2 W.C.A.T.R. 66; Decision No. 265 (1987), 4 W.C.A.T.R. 05

Cases considered: Meyer v. Workers' Compensation Board 15 O.A.C. 202; R. v. The Industrial Injuries Commission ex parte Amalgamated Engineering Union (No.2), [1966] 2 Q.B. 31; Ryan v. Queen (Ont. S.C.)(October 20, 1986)(unrep.); Workmen's Compensation Board v. C.P.R. and Noell, [1952] 3 D.L.R. 641

DECISION NO. 137/89 (30/03/89) Faubert Fox Meslin

Suitable employment.

A welder suffered a low back injury in September 1984. In March 1985, he was discharged from HRC to modified employment with restrictions against lifting over 10 kilograms. He returned to modified work for one day before laying off again.

Although modified work did not involve lifting, it did involve repetitive bending. An examination in 1987 confirmed a diagnosis of herniated disc with nerve root impingement. In light of this diagnosis, the medical restrictions were not appropriate. The modified work was not suitable.

The worker was entitled to temporary total disability benefits until September 1985 and to temporary partial benefits from then until March 1986.

Ss: 40(2)(b)

DECISION NO. 1084/87 (29/08/89) Kenny Robillard Guillemette (dissenting)

Exposure (trichloroethane) - Bronchitis.

The worker cleaned shirts, spraying them with Chlorothene Nu, the active ingredient of which was 1,1,1-trichloroethane. In March 1981, she was exposed to a higher concentration of fumes due to ventilation problems. She continued to work for three months but then laid off and has not worked since. The Appeals Adjudicator denied entitlement beyond October 1981.

The worker was suffering from cough, shortness of breath on exertion and chest pain. The main risk of exposure to 1,1,1-trichloroethane was depression of the central nervous system (like an anaesthetic) so the effects of overexposure occur immediately with few reported long term effects.

Chronic bronchitis is associated with excessive mucus production and is manifested by a productive cough. Chronic obstruction bronchitis involves chronic productive cough and significant airways obstruction.

The majority of the Panel found that the worker was entitled to benefits for the cough. The evidence supported chronic bronchitis related to the exposure in March 1981. The worker had a productive cough beginning immediately after the exposure. Medical opinion indicated that exposure could produce such long term effects.

The exposure did not cause lung damage which would account for the shortness of breath. Further, the worker's angina was not related to the exposure. There was not sufficient existing evidence to consider entitlement for anxiety and aversion reaction. This could be pursued with the Board. The worker's appeal was allowed in part.

Note: The opinion of the Worker Member was not available at the time this decision was released.

DECISION NO. 488/89 (29/08/89) Signoroni Robillard Jewell

Continuing entitlement.

A plumber suffered a right knee injury in May 1982. He returned to work in August 1982. He was supposed to be given light work but none was available. In January 1983, the worker laid off due to degenerative arthritis in his knee.

The worker had knee problems prior to the 1982 accident but these problems did not preclude him from carrying on his normal job. The accident was sufficiently severe that it weakened the knee to the point where the degenerative condition became symptomatic. The work from August 1982 to January 1983 further aggravated the worker's disability. The worker was entitled to full benefits until August 1983 and to a pension thereafter.

DECISION NO. 489/89 (29/08/89) Signoroni Robillard Jewell

Delay (reporting injury).

The employer appealed the granting of benefits to an automobile assembler for a left upper back and shoulder condition. The worker claimed that she slipped but managed to stop her fall by grabbing on to a nearby car which her left hand. She continued to work for three days before reporting the incident. At the time of the incident the worker had a severe cold.

The Panel found that an accident did occur. The worker did not report the incident immediately since she at first attributed the condition to her severe cold. Initial entitlement for the left upper back was confirmed. However, there was no reliable evidence of a shoulder injury.

DECISION NO. 686/89I (30/08/89) Kenny Cook Apsey

Adjournment (witness availability).

The worker requested an adjournment since his orthopaedic surgeon was not available to testify. The doctor had agreed to testify on the scheduled hearing date but notified the worker about three weeks before the hearing that he would not be available on that day. The worker felt the doctor's testimony was important and the employer did not oppose the adjournment.

The adjournment was granted. The Panel also directed Tribunal counsel to obtain updated material from the Board.

DECISION NO. 556/89 (31/08/89) Chapnik Jackson Seguin

Access to worker file, s. 77 - Procedure (absent parties).

Neither the worker nor the employer were present at a s.77 hearing. On being contacted by Tribunal counsel, the worker indicated that she had forgotten about the hearing. Both the worker and employer indicated that the hearing could proceed in their absence.

The Panel proceeded with the hearing and granted access to the worker's file to the employer.

DECISION NO. 350/90 (27/05/91) Starkman McCombie Jago

Continuing entitlement - Consequences of injury (iatrogenic illness) (medication) (tinnitus) - Health care (chiropractic) - Tinnitus.

In November 1981, the worker struck his head on a beam. Due to the neck injury that resulted, he received total benefits from December 1981 to January 1983. He returned to regular work in April 1983. The worker performed modified duties from February 1984 until May 1985, when he again returned to regular duties.

The worker's benefits were discontinued in January 1983, following his discharge from HRC in December 1982, with a recommendation that he return to any type of work available with the accident employer. The date of discharge from HRC is often the appropriate date for termination of benefits when there has been a return to the worker's pre-accident state. In this case, however, the Panel extended entitlement to benefits from January 1983 to March 1983. It considered that the worker had been on temporary benefits for more than one year, that he was still complaining of a number of symptoms at the time of his discharge, and that he did not return to modified work until April 1983.

The worker was not entitled to benefits for the tinnitus which he began to experience in January 1983. It was unlikely that the drugs Halcion or Mellaril, which were administered to the worker while he was at HRC in November 1982, would continue to cause the ringing in his ears many years after he had taken them. The worker's tinnitus was probably related to his preexisting non-compensable otosclerosis.

Since the 1981 accident the worker had complained of headaches, nausea, shoulder pain and arm pain. Medical examinations indicated no organic basis for these problems and no residual psychiatric problems. The only report on file drawing a causal connection was from the worker's chiropractor. The worker had returned to his employment in 1983 and there was subsequently no significant lost time from employment. As the worker's ongoing problems were not related to his 1981 accident, he was not entitled to reimbursement for ongoing chiropractic treatment.

The worker was not entitled to a wage loss payment for the period from February to May 1985. He received the same base salary during that period as he did prior to the accident, but was ineligible to receive a production bonus. As the worker's condition after March 1983 was not causally related to his 1981 accident, he was not entitled to a wage loss supplement. [8 pages]

DECISION NO. 926/90 (27/05/91) Onen Ferrari Barbeau

Availability for employment (refusing suitable work).

The worker suffered a low back strain in November 1987. The employer appealed a decision of the Hearings Officer granting temporary benefits from August 1988 to November 1989. The worker appealed granting of only 50% temporary benefits during part of the period.

The worker had medical restrictions against heavy lifting and repetitive bending. In addition, the worker's doctor added a restriction against working in a mechanized area due to medication that the worker was using. The Panel found that the employer offered jobs that were within the physical medical restrictions. The pharmacological restriction was imposed at the worker's request by her doctor who appeared to have taken on the role of an advocate on behalf of the worker. Based on observation of the worker during vigorous cross-questioning and on the evidence, the Panel did not note any symptoms of the claimed mental impairment from medication, such as drowsiness, forgetfulness or disorientation.

On the evidence, the worker was not genuinely interested in returning to work during the period in question. There were contradictions between her statements and her conduct. She stated that she was concerned about working near machines at work but she was able to care for her five children at home without assistance and to drive a car.

The worker failed to be available for and to accept suitable employment. The employer's appeal was allowed. The worker's appeal was dismissed. The Board was directed to determine benefits that would be payable pursuant to s. 40(3). [22 pages]

WCAT Decisions Considered: Final Decision No. 2 (1987), 4 W.C.A.T.R. 1 reld to; Decision No. 926/90 reld to

DECISION NO. 246/91 (27/05/91) McGrath Jackson Meslin

Recurrences (compensable injury) (strains and sprains) - Subsequent incidents (outside work).

Between February 1982 and March 1985, the worker suffered three compensable accidents to his lower back and two compensable accidents to his neck and thoracic back. All of these injuries were diagnosed as soft-tissue strains. On each occasion he returned to work while he was still in pain because he was concerned about losing his job as a heavy equipment mechanic.

In February 1986, while picking up a hair dryer at home, he experienced sharp pain in his upper back. He decided that his back was simply too sore to continue his heavy mechanical work and he obtained work as a salesman. In June 1986, while driving, he experienced severe back pain and leg numbness. He underwent surgery for removal of a disc in his lower back. The worker sought benefits for the periods of disability following these two incidents, claiming that they were related to the compensable accidents.

The orthopaedic surgeon who performed the surgery pointed out that, though the previous injuries were diagnosed as strains, it was impossible to tell whether or not the disc was damaged. He stated that the

worker's numerous back injuries would have definitely predisposed him to the lumbar disc prolapse. There was no evidence to support the Board doctor's finding of significant preexisting degenerative disc disease.

On a balance of probabilities, the compensable accidents caused the worker's low back problems following the June 1986 incident. Based on the benefit of the doubt, the worker was also entitled to benefits for his upper back condition following the February 1986 incident. [7 pages]

DECISION NO. 321/91I (27/05/91) Newman Klym Preston

Adjournment (additional medical evidence).

The worker was appealing denial of entitlement for Dupuytren's Contracture. The appeal was adjourned so that a transcript of evidence of an expert given in a different appeal could be obtained. [3 pages]

DECISION NO. 734/90I (28/05/91) Robeson Jackson Apsey

Issue setting - Chronic pain.

The worker was appealing the reduction of her temporary benefits to the 50% level for a certain period and the rating of her pension award at the 10% level. The Board doctor who initially assessed the worker recommended the 10% rating "on an organic basis" but his report noted a "significant non-organic component". Another medical report also referred to an emotional component to the worker's complaints. The discharge report from HRC suggested that the Board conduct a psychological evaluation, but that suggestion was not acted upon.

This appeal included a chronic pain issue that was within the Tribunal's jurisdiction. However, there was insufficient evidence about the chronic pain issue at this time. The matter was referred to the Board for investigation and assessment under its chronic pain policy. [7 pages]

DECISION NO. 250/91I (28/05/91) Newman Jackson Barbeau

Adjournment (referral to Board) - Parties (representation) (adequacy).

The worker was appealing the denial of continuing entitlement for a neck and shoulder disability. At the proceedings before the Hearings Officer, the worker's claim to benefits for a psychotraumatic disability had been withdrawn. When the Panel asked about the status of the claim for emotional disability, it was advised by the worker's representative that there was no emotional disability resulting from the accident and that it was the worker's intention only to pursue benefits for an organic condition.

From the medical reports, it was apparent that the worker's doctor was treating her condition with antidepressant medication. The worker confirmed that she was taking this medication and that she suffered from anxiety and depression. The Panel explained to the worker that it had no jurisdiction to deal with the possible emotional disability because it had not yet been determined by the Board. It was also reluctant to proceed with respect to the organic aspect of the disability when the possibly relevant emotional condition remained unexplored.

The worker indicated that she understood and wished to pursue a claim for emotional disability with the Board. The Panel adjourned the matter and referred the claim for emotional disability to the Board.

The Panel reprimanded the worker's representative. First, for failing to prepare his case in sufficient time to ensure that all documentation was submitted in time to comply with the Tribunal's "three week rule". Secondly, for failure to fully advise his client about her claim. The worker appeared not to have been advised of her right to pursue a claim for emotional disability, notwithstanding the clear evidence of treatment for such a disability. Though the Panel had no authority to make an order on this aspect of the matter, it recommended that the worker's representative, a lawyer, not charge for his services. [6 pages]

WCAT Decisions Considered: Decision No. 600/89 apld

DECISION NO. 252/91 (28/05/91) McGrath Beattie Barbeau

Continuing entitlement.

The worker was not entitled to ongoing compensation for a back disability subsequent to October 1986. His soft tissue injury, which had resulted from a compensable accident in October 1980, had healed by February 1982. The worker operated an auto body repair business from 1982 to October 1986. It was not credible that the worker, who was familiar with the compensation system, would have suffered the degree of disability that he claimed between 1982 and 1986 without making a claim. It was probable that the worker had suffered backaches prior to the 1980 accident. [6 pages]

DECISION NO. 316/91 (28/05/91) Faubert Higson Preston

Pensions (assessment) (finger) - Recurrences (compensable injury) - Herpes simplex.

The worker got a sliver in his left index finger in 1960. The wound became infected and the infection, diagnosed as herpes simplex, has recurred on many occasions. The worker appealed a decision of the Hearings Officer denying an increase in the worker's 1% pension.

When the worker is disabled by an acute period of infection, he is entitled to benefits for a recurrence. At other times, there is no impairment. He has full use of the finger when it is not infected. Although the condition was an annoyance, it did not cause a significant impairment of the worker's earning capacity. The appeal was dismissed. [7 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to

DECISION NO. 357/91 (28/05/91) McCombie Lebert Preston

Pensions (assessment) (back).

The Panel confirmed the worker's low back pension rating at 15%. That rating had initially been granted pursuant to a 1980 Board assessment. The worker was assessed again by the Board in 1988 and 1990. He was also examined by his treating orthopaedic specialist in 1990.

The issue was not whether the subsequent assessments and reports indicated a condition worse than it was in 1980. The issue was whether, considering the latest reports, the 15% level was in keeping with the physical findings. In this case there was no substantial difference in the physical findings of the Board

doctor's and the worker's specialist. When those findings were applied to the benchmarks in the Rating Schedule, 15% was an appropriate rating. [7 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 *reld to*

DECISION NO. 375/90RI (29/05/91) Kenny Higson Meslin

Reconsideration (clarification of decision).

The worker asked for clarification of Decision No. 375/90. The main issue in that decision was whether the worker's 45% pension rating was correct. Decision No. 375/90 denied the worker's request for a higher rating. However, it did grant the worker full temporary benefits for a period in 1986 and stated that the Hearings Officer had found that the worker was not entitled to 100% temporary benefits for a period in 1986 because the worker was in Italy.

The worker stated that he was not in Italy during 1986 and could not understand the finding with respect to a period of total disability in 1986. On reviewing the transcripts and material filed with respect to Decision No. 375/90, the Reconsideration Panel could not understand why entitlement to full temporary disability benefits in 1986 was an issue. It seemed that an error had occurred, possibly a computer problem that resulted in part of another decision being inserted into Decision No. 375/90.

It was advisable to reconsider the part of Decision No. 375/90 which dealt with temporary benefits in 1986. Since it would be understandable that the worker's confidence in the rest of the decision might be undermined by the fact that the original Hearing Panel appeared to have dealt with an extraneous issue, the portion of Decision No. 375/90 dealing with the correctness of the pension ratings should also be reconsidered, if the worker so desired. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 *reld to*; Decision Nos. 72R *reld to*, 72R2 *reld to*, 375/90 *reld to*

DECISION NO. 279/91 (29/05/91) Sandomirsky M. Cook Chapman

Second Injury and Enhancement Fund (preexisting condition).

The worker suffered a shoulder injury. She was awarded a 10% pension after more than three years of treatment. The employer appealed a decision of the Hearings Officer denying SIEF relief.

Although the worker's claim may have extended beyond the usual healing time, it was not established that she had a preexisting condition that prolonged or enhanced the disability. The appeal was dismissed. [4 pages]

WCAT Decisions Considered: 186/91 *reld to*

Board Directives and Guidelines: Operational Policy Manual, Document no. 08-01-05

DECISION NO. 312/91 (29/05/91) Faubert B. Cook Meslin

Aggravation (preexisting condition) (spondylolisthesis) (asymptomatic).

A construction labourer suffered an upper back disablement from the nature of his strenuous work in

December 1987. The worker appealed a decision of the Hearings Officer denying benefits subsequent to March 1988. The Hearings Officer found that a low back condition was not compensable. On the evidence, the Panel found that worker aggravated preexisting asymptomatic spondylolisthesis in the accident. The low back condition was also compensable. The appeal was allowed. [8 pages]

DECISION NO. 374/91 (29/05/91) Kenny Jackson Jago

Maximal medical rehabilitation.

The worker suffered compensable injuries for which he was awarded a 10% pension. The worker appealed a decision of the Hearings Officer denying temporary benefits subsequent to February 1988. The Panel found that the worker had achieved maximal medical rehabilitation. His condition did not deteriorate. The appeal was dismissed. [5 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to

DECISION NO. 765/90 (30/05/91) Hartman Lebert Nipshagen

Temporary total disability - Temporary disability (beyond pension level) - Overpayment.

The worker suffered a low back injury in 1971 with respect to which he was paid temporary benefits for various periods up to March 1987. He was awarded a 10% pension in 1980 for this back condition, that was increased to 20% effective December 1984. In 1982 the worker hit his head on a beam and suffered a stiff neck. Medical benefits were paid but there was no lost time as a result of the 1982 accident.

The worker sought total temporary benefits for the period from August 1986 to March 1987. During this period the worker was receiving pension benefits and was also paid temporary partial benefits, reduced to 50%.

According to his doctor, the worker's neck complaints were the main cause of his inability to work from August 1986 to March 1987. The Panel found that there was no relationship between the 1982 accident and the worker's neck condition during the period in question. Degenerative changes in the neck area were noted in a 1980 x-ray. The first mention of neck complaint after the 1982 accident was in 1985 and the worker's doctor thought that the complaints were due to degenerative changes.

The worker originally claimed that his total disability during the period in question was due to his neck, but now claimed that it was due to his low back. There was no evidence that the worker was temporarily partially disabled beyond his pension level with respect to his low back.

The 50% temporary partial benefits thus constituted an overpayment. As it resulted from the confusion created by the Board combining the neck and the back claims, the overpayment should not be recovered by the Board. [8 pages]

DECISION NO. 230/91 (30/05/91) Faubert Rao Apsey

Temporary partial disability.

The worker injured her back at work in January 1986. She returned to modified work in February 1986 and from that time until April 1989, she performed light work half of the time and was on general layoff the rest

of the time. During this period the worker made no claim for benefits while on general layoff and received no medical treatment, other than chiropractic treatment in April 1986. The worker was never assessed for a pension for this condition.

Between April and June 1989 there was no suitable light work available for the worker. The employer advised her that she would be covered by workers' compensation for this period. She thus did not feel that it was necessary to attend at a doctor to document her complaints.

The Panel accepted that the worker had ongoing back problems from 1986 to 1989. However, even if these symptoms could be characterized as a disability, they could not be properly characterized as a temporary disability between April and June 1989. She did not stop working in April 1989 because of a worsening of her back symptoms, but because of the unavailability of suitable modified employment of the type that she had demonstrated her capacity to perform over the past three years. There was no change in her condition over those three years.

The worker thus was not suffering from a temporary partial disability between April and June 1989. Accordingly, she was not entitled to temporary partial disability benefits. The Panel made no finding with respect to the worker's entitlement to a pension for a disability resulting from the January 1986 compensable accident. [7 pages]

DECISION NO. 341/91I (30/05/91) Hartman Rao Jago

Adjournment (referral to Board).

The case was referred back to the Board to consider outstanding issues regarding organic and non-organic disability. [4 pages]

DECISION NO. 314/91 (31/05/91) Bradbury Drennan Sutherland

Disablement (nature of work) - Medical opinion (Dupuytren's contracture) - Dupuytren's contracture.

The worker appealed a decision of the Appeals Adjudicator denying entitlement for a bilateral hand condition, diagnosed as Dupuytren's contracture. The worker was a taggler at a tannery from 1955 to 1984. He claimed that the condition was due to the nature of his work, which required repetitive attaching of clamps.

The worker did the same job for about 25 years before the condition developed. Medical literature was inconclusive regarding a relationship between manual labour and onset or aggravation of Dupuytren's contracture. At best, the literature indicated no greater incidence of the disease in manual labourers than in other workers. None of the worker's treating specialists supported a relationship between the worker's work and the onset of the condition.

The Panel concluded that the evidence against a relationship between work and the disease outweighed the other evidence. The appeal was dismissed. [8 pages]

DECISION NO. 944/87 (03/06/91) Kenny Lebert Barbeau

Delay (reporting injury).

The worker appealed a decision of the Appeal Board denying entitlement for a low back disability. The

worker was thrown a considerable distance in an explosion, likely 40 to 75 feet. He did not report back problems until four months after the accident.

The Panel found that the worker suffered a back injury in the accident. The accident was physically traumatic. It was also emotionally traumatic (three co-workers were killed in the accident), and this may explain the delay.

The appeal was allowed. [10 pages]

WCAT Decisions Considered: 944/87L reld to, 944/87LR reld to, 944/87LR(2) reld to

DECISION NO. 619/90 (03/06/91) Bradbury B. Cook Meslin

Delay (reporting injury) - Credibility.

The worker suffered a hand injury at work in November 1987. The worker appealed a decision of the Hearings Officer denying entitlement for a back condition, diagnosed as a herniated disc, which the worker claimed he suffered in the same accident or as a result of the nature of his work.

Considering inconsistencies in the worker's evidence, delay in reporting the back condition and evidence suggesting that the back condition was a progression of a preexisting degenerative condition, the Panel found that the condition did not arise out of and in the course of employment. The appeal was dismissed. [9 pages]

DECISION NO. 954/90 (03/06/91) Moore Klym Preston

Accident (occurrence) - Disablement (strenuous work) - Tendonitis (rotator cuff) - Carpal tunnel syndrome.

The employer appealed a decision of the Hearings Officer granting entitlement for left rotator cuff tendonitis and left carpal tunnel syndrome. The worker started work for the employer on April 27, 1987. The job required repetitive heavy lifting of concrete building materials. The worker stopped working on June 12, 1987.

On the evidence, the Panel found that the worker suffered a shoulder injury on April 28, 1987, and he continued to suffer pain in the shoulder until he stopped working in June. The worker may have been predisposed to developing carpal tunnel syndrome but he did not have any symptoms of carpal tunnel until after the accident. The repetitive, heavy work made a significant contribution to the onset of carpal tunnel syndrome.

The appeal was dismissed. [9 pages]

WCAT Decisions Considered: 732/87 reld to

DECISION NO. 208/91 (03/06/91) Stewart M. Cook Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for some irrelevant references. [3 pages]

DECISION NO. 209/91 (03/06/91) Stewart M. Cook Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 295/91 (03/06/91) Newman Lebert Howes

Pensions (assessment) (back).

The worker suffered a back injury in 1984 for which he was awarded a 15% pension, later increased to 25%. The worker appealed a decision of the Hearings Officer confirming the level of the pension.

The worker had a significant back disability. The intent of a pension is to recognize the usual impairment of earning capacity of an average unskilled worker with a similar disability. The worker's disability was described similarly by his doctors and by the pension examiners. There was no reason to disturb the award. The appeal was dismissed. [7 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 *reld* to

DECISION NO. 376/91 (03/06/91) Kenny Jackson Jago

Issue setting - Referral to Board.

The worker was appealing a decision of the Appeals Adjudicator denying entitlement for a knee disability which the worker claimed he suffered in an accident in 1984. In a separate decision, the Board had also denied entitlement for knee injuries suffered in an accident in 1985 but the worker had not yet appealed that decision at the Board.

The Panel would not hear the appeal until there had been a final decision of the Board regarding the 1985 accident. The matter was referred back to the Board. [6 pages]

WCAT Decisions Considered: 699/87L *reld* to

DECISION NO. 377/91 (03/06/91) Chapnik Lebert Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 378/91 (03/06/91) Chapnik Lebert Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 379/91 (03/06/91) Chapnik Lebert Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 81/91 (04/06/91) Kenny B. Cook Apsey

Commutation (debt liquidation).

In Decision No. 81/91I, the Panel allowed the worker an opportunity to provide further financial information in support of a request for commutation of the worker's pension.

The worker's financial situation was producing a disability. The additional information satisfied the Panel that the worker has taken steps to ensure that he will stay out of debt in the future. Thus, the commutation will significantly remedy the financial situation which is producing the disability.

The Panel granted a partial commutation for the purpose of paying debts. [3 pages]

WCAT Decisions Considered: 81/91I reld to

**DECISION NO. 313/91 (04/06/91) Newman M. Cook Barbeau
Prince v. Deakins**

Section 15 application - In the course of employment (proceeding to and from work).

The defendant in a civil case applied to determine whether the plaintiff's right of action was taken away. The issue was whether the plaintiff was in the course of employment at the time of a motor vehicle accident.

The plaintiff was proceeding from his home in Wiarton to his office in Brampton, a distance of about 105 miles. He had another office in Owen Sound. He went to the office in Brampton about once every two weeks.

The office in Brampton was one of the plaintiff's regular work sites and the trip was a regular one which the plaintiff had to make in order to commute to work. The case came within the general rule that a person is not in the course of employment while proceeding to and from work.

The plaintiff's right of action was not taken away. [7 pages]

DECISION NO. 331/91 (04/06/91) Faubert B. Cook Jago

Permanent disability (inability to return to work) - Dermatitis (contact).

The worker stopped working due to contact dermatitis, which resulted from exposure to chemicals in his work as a bricklayer. The employer appealed a decision of the Hearings Officer awarding a two year provisional pension.

Although there were no longer any physical findings on examination, the worker could not return to work as a bricklayer. The worker's sensitivity to chemicals was a "physical or functional abnormality" within the definition of permanent disability in s. 45(12) of the pre-1989 Act. It was a pathological condition which

would result in observable physical findings if the worker were exposed to the offending substances. The Board correctly interpreted s. 45 and granted a provisional pension in accordance with its policy for reviewing the award at appropriate intervals.

The appeal was dismissed. [6 pages]

Ss: 45(12) pre-1989

Board Directives and Guidelines: Claims Services Division Manual, Sch. 3(6), p. 277, Directive 2

DECISION NO. 346/91 (05/06/91) Sandomirsky Shartal Apsey

Access to worker file, s. 77.

The worker was awarded benefits for an injury resulting from a fall on a chair. The employer disputed initial entitlement on the basis that the worker's fall was due to a non-compensable cardiac arrest. The employer also disputed ongoing entitlement.

The employer was granted access to medical reports referring to the worker's cardiac condition as they were relevant to the issues in dispute, given the employer's theory of causation. This was so, even though the worker made no compensation claim for his cardiac condition. References to the objective findings on the psychological report should also be released. They summarized the results of tests which evaluated the worker's rehabilitation potential and were thus relevant to the issue of ongoing entitlement.

References to the worker's personal life, and to non-compensable conditions that had resolved, were not relevant to the issues in dispute. Such references should be edited out of the reports released to the employer. [4 pages]

WCAT Decisions Considered: Decision No. 142/89

DECISION NO. 90/89 (06/06/91) Bigras Lebert Ronson

Medical opinion (tenosynovitis) - Industrial disease (tenosynovitis) - Tenosynovitis - Postal workers (coding clerk).

The worker sought benefits for wrist tenosynovitis. She was a part-time postal clerk who worked 21 hours per week. All of her tasks involved considerable wrist movement, but it was coding on a computerized keyboard that she specifically pointed to as the cause of her disability. Keyboard entries on the machine in question were always made with one hand. The worker's rate could have reached up to 230 strokes per minute with the one hand.

Studies identified the coder position as one that could cause wrist problems. An American survey indicated that 54% of coders with a stroke rate of less than 180 strokes per minute had developed wrist problems after 2.5 years' service. Surveys conducted of the worker's station showed that a notable percentage of coders interviewed had suffered wrist problems. The 11 hours per week that the worker spent as a coder were sufficient to contribute to the onset of wrist problems.

The Panel accepted the medical evidence of the s. 86h assessor, that supported a causal relationship between the worker's tenosynovitis and her employment, over that of the Board doctor. The latter was unaware of the difficulties encountered by postal clerks using coding keyboards and he did not examine the worker.

The nature of the worker's employment was of the type that could result in wrist tenosynovitis. She was suffering from an industrial disease and the resulting disability was thus compensable. [19 pages]

WCAT Decisions Considered: Decision No. 90/89I reld to

Other Statutes Considered: Government Employees' Compensation Act, R.S.C. 1970, c. G-8, s.2

DECISION NO. 551/89R (06/06/91) Hartman Higson Preston

Reconsideration (clarification of decision) - Damages, contribution or indemnity.

The Panel amended Decision No. 551/89 to clarify that s. 8(11) was applicable to limit the plaintiff's right to recover damages from defendants against whom the right of action was not taken away. [5 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decisions No. 72R reld to, 72R2 reld to, 551/89 consd

DECISION NO. 200/91 (06/06/91) Sandomirsky Higson Meslin
Coco Paving Inc. v. Maki

Section 15 application (action by employer) - Employer (definition of).

The defendants in a civil action applied to determine whether the plaintiff's right of action was taken away. The plaintiff was the widow of M, who died in a motor vehicle accident while making a business-related trip. The issue was whether M was a worker or an employer and whether the action was barred.

M operated a printing business. He did not have personal coverage. On the evidence, M employed workers. Accordingly, M was an employer within the definition in s. 1(1)(k). M was not a worker of the business. M ran the business as a sole proprietor. Since the business was not incorporated, it was not a separate legal entity. Therefore, the business and the owner are one and the same. One cannot be a worker of the other.

The Act cannot bar an action unless an alternative remedy is available. Section 8(9) lists Schedule 1 employers as one of the groups barred from bringing an action. However, this bar is modified by the requirements that there must be an injury for which benefits are payable under the Act and that both workers must be in the course of employment at the time of the happening of the injury. Unless an employer elects to be deemed a worker under s. 11, there are no benefits payable to an employer under s. 3(1).

The Panel concluded that s. 8(9) does not bar an employer, who has not elected personal coverage, from suing another Schedule 1 employer. Accordingly, the plaintiff's right of action was not taken away. [10 pages]

Ss: 8(9)

WCAT Decisions Considered: Decision No. 170/90 (1990), 14 W.C.A.T.R. 282 reld to; Decisions No. 384 reld to, 525 consd, 469/88 consd

Other Statutes Considered: Business Corporations Act, 1982, S.O. 1982 c. 4, s. 15

Cases Considered: Ellis v. Joseph Ellis and Co., [1905] 1 K.B. 324 consd; Meyer v. Ontario (Workers' Compensation Board) (1986), 15 O.A.C. 202 (Div. Ct.) consd; Re Thorne and New Brunswick Workmen's Compensation Board (1962), 33 D.L.R. (2d) 167 affd [1962] S.C.R. viii reld to

DECISION NO. 275/91 (06/06/91) Sandomirsky M. Cook Chapman

Administrative Fund (transfer of costs) - Board Directives and Guidelines (partial disability benefits) (suitable employment).

The worker stopped working in June 1988, on the recommendation of his doctor. He returned to work in November 1988 after the Board concluded that the employer had made suitable work available to the worker in June. He received temporary total disability benefits from June to November pursuant to Board policy to continue temporary total disability benefits until a discrepancy regarding suitability of work is resolved. The employer appealed a decision of the Hearings Officer denying a transfer of costs to the Administrative Fund for the period from June to November.

The employer submitted that it should be relieved of costs of delay by the Board in investigating the suitability of the work. The Panel agreed with Decision No. 431/89 that conduct of the Board, which is a significant contributing factor in prolonging a claim, could constitute an assessment inequity justifying transfer of costs to the Administrative Fund. However, there was no such assessment inequity in this case. Although the Board could have taken action sooner, this was the type of delay which is part of daily life in a large organization. It was not of a magnitude that should attract cost relief.

The appeal was dismissed. [6 pages]

WCAT Decisions Considered: Decision No. 431/89 (1989), 11 W.C.A.T.R. 355 distd

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-19-09

DECISION NO. 301/91 (06/06/91) McCombie Higson Apsey

Apportionment (standard of proof) - Transfer of costs - Negligence (duty of care) (Occupiers' Liability Act).

The employer appealed a decision of the Hearings Officer denying a transfer of costs of an accident to a second employer under s. 8(9). The worker was delivering goods to the second employer when he fell off the loading dock. The worker had been making deliveries to this location twice a day for 13 years. The appellant employer submitted that the second employer was negligent in failing to exercise a reasonable standard of care that was required under common law and the Occupiers' Liability Act.

Clear negligence was not required before costs could be transferred under s. 8(9). However, a very broad interpretation of the cost transfer provisions could result in an endless stream of fault finding in a no fault system and a new role for adjudicators for which they were not equipped to deal. In Decision No. 17/8912, negligence was defined as the absence of reasonable care under the circumstances. Reasonable care under the circumstances of a cost transfer could be considerably different than under circumstances of the common law or Occupiers' Liability Act.

The Panel proposed a test as follows: 1) under the circumstances of a work-related disability, what was the reasonable standard of care; 2) was the standard breached by another Schedule 1 employer or its workers; 3) if so, did the breach make a significant contribution to the accident.

In this case, the Panel found that the reasonable standard of care should be determined by looking at the Occupational Health and Safety Act and its regulations since that Act was designed to address the duty of care in commercial and industrial settings. The regulations to the Occupational Health and Safety Act did not require guardrails on loading docks of industrial establishments or for open areas with a vertical fall of less than 2.4 metres at construction projects.

The Panel found that the second employer was not negligent in failing to have guardrails on the dock.

The appeal was dismissed.

The Panel noted two issues of concern that were not necessary to consider in this case. The first was limitation periods, which are safeguards to defendants and are often applicable in civil actions, whereas there is no limitation period under s. 8(9). The second was the lack of standing at previous hearings if it is determined years later on appeal that costs should be transferred to a second employer. [10 pages]

Ss: 8(9)

WCAT Decisions Considered: Decision No. 716/87 (1987), 6 W.C.A.T.R. 242 not folld; Decision No. 17/8912 (1990), 13 W.C.A.T.R. 118 consd; Decision No. 688/89 (1990), 14 W.C.A.T.R. 156 reld to; Decisions No. 657/87 reld to, 213/88 reld to, 586/89 reld to, 111/91 consd
Other Statutes Considered: Occupational Health and Safety Act, R.S.O. 1980 c. 321, Reg. 691 ss. 58, 59, Reg. 692 ss. 14(1), 14(2); Occupiers' Liability Act, R.S.O. 1980 c. 322, ss. 3(1), 4(1)

Cases Considered: Crocker v. Sundance Northwest Resorts Ltd. 91988), 51 D.L.R. (4th) 321 (S.C.C.) reld to; Niblock v. Pacific National Exhibition and City of Vancouver (1981), 30 B.C.L.R. 20 reld to; Sauve v. Provost (1990), 71 O.R. (2d) 774 reld to; Waldick v. Malcolm (1989), 70 O.R. (2d) 717 reld to

DECISION NO. 329/91 (06/06/91) McGrath Drennan Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a portion of one report which was not relevant. [3 pages]

DECISION NO. 330/91 (06/06/91) McGrath Drennan Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a portion of one report which was not relevant. [4 pages]

DECISION NO. 358/91I (07/06/91) Newman Rao Clarke

Access to worker file, s. 77 - Freedom of information.

The worker appealed a decision of the Access Specialist to release documents to the employer. The documents in question were a social work report and a psychiatric report. These documents contained extremely personal information. The Panel did not want to make its decision without considering the interaction between s. 77 and the Freedom of Information and Protection of Privacy Act.

Section 39(2) of the Freedom of Information Act requires that notice be given to a person where personal information is collected. The Panel requested information from the Board regarding such notice to the worker that information was being collected. The Panel would proceed after receiving this material from the Board. [5 pages]

Other Statutes Considered: Freedom of Information and Protection of Privacy Act, 1987, S.O. 1987 c. 25, s. 39(2)

DECISION NO. 359/91 , (07/06/91) Newman Rao Clarke

Medical examination (section 21) (provision of report to worker).

The employer applied for an order requiring the worker to attend a medical examination. The examination was important to achieving a valid compensation goal. The worker objected to the examining physician being in contact with the employer and receiving information which may not be presented in an objective manner. The worker had already arranged an appointment with a different doctor. This doctor was acceptable to the employer.

The Panel ordered that the worker attend the examination with that doctor. Communication by the employer with the doctor should be in writing with copies provided to the worker. Any report prepared by the doctor following the examination should be distributed to the worker, the employer and the Board. [4 pages]

DECISION NO. 368/91 (07/06/91) McCombie M. Cook Barbeau

Continuing entitlement.

The worker suffered back injuries in 1968 and 1980. The worker appealed a decision of the Hearings Officer denying entitlement to a permanent disability assessment.

On the evidence, the worker had a residual back disability. The appeal was allowed. The Board was directed to assess the worker for a pension. [6 pages]

DECISION NO. 806/89 (10/06/91) Strachan B. Cook Howes

Class of employer (manufacturing) (carpets) - Class of employer (manufacturing) (yarn) - Class of employer (dual rates).

The employer had a yarn spinning plant and a carpet plant. The two plants were located on one geographic site but were separate operations with separate entrances and supervisory staff as well as separate payrolls. Most of the yarn produced was sent to the carpet plant but up to 10% of it was sold to third parties. The employer appealed a decision of the Hearings Officer classifying all of the employer's operations as carpet manufacturing under Rate Group 555 except for a proportional part of the payroll attributable to sales of yarn to third parties.

Section 5(1) of Reg. 951 provides that employers should be assessed as a unit. The exceptions to this in s. 5(2) include employers that carry on operations in more than one class where each operation is carried on as a business or trade or for profit or gain and there is segregation of payroll. The word "trade" was not intended as a technical term. It was intended to have the ordinary meaning of a field or area of business activity involving skilled handicraft or mechanical employment.

To come within the exception in s. 5(2)(b), an operation should be a viable operation or enterprise which has not been totally integrated into another production or service operation. Each operation must have a class or rate group into which the operation fits. The indicia of a viable operation include: separate premises; separate work force; arms length transactions at fair market value; separate financial statements; separate supervisory staff, work schedules and collective agreements.

In this case, the Panel found that the yarn spinning operation came within the exception in s. 5(2)(b) and should be classified under Rate Group 591, which includes knitting and spinning as well as manufacture of yarn. The appeal was allowed. [10 pages]

Regulations Considered: Reg. 951, ss. 5(1), 5(2)(b), Schedule 1 class 17

Board Directives and Guidelines: Employer Assessment Policies Manual, Document no. 03-02-02

DECISION NO. 1012/89 (10/06/91) Strachan B. Cook Preston

Time limits (section 77) - Jurisdiction, Tribunal (final decision of Board)

(matter expressly conferred upon Tribunal) - Jurisdiction, Tribunal (final decision of Board)

(waiver of Board hearing) - Access to worker file, s. 77.

On a s. 77 appeal, a preliminary issue arose as to whether the employer had failed to comply with the 21 day limitation period set out in s. 77(6).

On July 11, 1989, the Board sent the employer the relevant non-medical documents, pursuant to s. 77(3). An accompanying letter advised the employer of the worker's right to review the relevant medical documents before they could be sent to the employer. At this time, the employer would also have received a Board Access Review Memo indicating that only edited versions of certain relevant medical reports would be sent to the employer.

Also on July 11, 1989, the Board sent the worker the medical documents which it proposed to send to the employer because they were relevant to the issue in dispute. An accompanying letter advised the worker of his right to object to the release of the relevant medical information, pursuant to s. 77(5). In neither of the July 11 letters was it stated that there were medical documents which the Board had concluded were not relevant.

The worker objected to the release of the medical information. By a letter dated August 16, 1989, the Board advised the worker that it had decided that all of the medical reports, except one, were relevant. This letter did not mention the deletions that would be made to some of the relevant documents, as stated in the Access Review Memo. The worker was also advised of his right to appeal within 21 days pursuant to s. 77(6). A copy of this letter was sent to the employer.

The worker appealed to the Tribunal within 21 days of the Board's August 16 letter. The employer did not indicate to the Tribunal that it wished to appeal the decision to withhold the one medical report and to make the deletions mentioned in the Access Review Memo within 21 days of August 16.

The Panel concluded that the primary purpose of the 21 day limitation period in s. 77(6) was so that the Board could send out the material to the employer, if it had not heard from the worker within 21 days. If there were no time limit, the worker could hold up the employer's access indefinitely, simply by not responding. There is, however, no compelling reason to insist that the employer must file an appeal within 21 days of the Board's final decision on the worker's objection.

An employer may not realize that medical reports have been edited or withheld until it actually receives the medical information that is released to it. Employers should not be required to ferret out such information from the Access Review Memo. Employers are entitled to receive a formal decision from the Board on matters that are of concern to them. Furthermore, employers often will not be in a position to make an informed decision about whether to seek access to information that the Board considered irrelevant, until they have received the information judged to be relevant.

The 21 day limitation period with respect to employer appeals starts once the Board has made a final decision concerning the employer's appeal, not when the Board makes a final decision concerning the worker's appeal. Therefore, this employer was not precluded from appealing the Board's decision to withhold

information because of the 21 day limitation period in s. 77(6).

The employer stated that it received a final decision by way of a telephone communication. The Panel had concerns as to whether a telephone communication alone could constitute a formal decision. However, it concluded that a final decision of the Board is not required with respect to an employer appeal under s. 77. Section 86g(2) requires a final Board decision before the Tribunal can hear an appeal. However, s. 86g(2) applies only to s. 86g(1)(b) or (c). An appeal by an employer concerning s. 77 is a "matter or issue expressly conferred upon" the Tribunal by the Act, under s. 86g(1)(a).

An employer can waive its right for a hearing before the Board and ask the Tribunal to hear its appeal directly. This would mean that the entire question of access could be considered by a single panel rather than having the issue dealt with in two separate proceedings for the worker's and employer's appeals. This Panel thus had jurisdiction to hear both the worker's appeal of the Board's decision to release information and the employer's appeal of the Board's decision to withhold information.

The worker's appeal was dismissed. Access to the medical information proposed to be released by Board was granted to the employer as it was relevant to the issue in dispute. The employer's appeal was also dismissed. The minor deletions made to some of the reports, and the one report which was excluded from release entirely, were not relevant. [11 pages]

Ss: 77(6), 86g(1)(a)

DECISION NO. 1/90 (10/06/91) Starkman McCombie Meslin

Delay (claim) - Disablement (repetitive work).

The worker appealed a decision of the Hearings Officer denying entitlement for a back condition which the worker related to an unwitnessed specific incident in 1978 or to the nature of her work.

The Panel found that the back condition was not caused by a specific incident in 1978, considering that the worker was able to continue working, did not seek medical attention until 1982 and did not claim benefits until 1987. Further, the condition was not a disablement from the repetitive nature of the worker's job. Medical reports did not support a causal relationship.

The appeal was dismissed. [10 pages]

DECISION NO. 201/91 (10/06/91) McIntosh-Janis M. Cook Barbeau Glengarry Transport Ltd. v. Walsh

In the course of employment (distinct departure test) - In the course of employment (proceeding to and from work).

The defendant's Section 15 Application was dismissed as the Panel found that the plaintiff was not in the course of his employment at the time of their motor vehicle accident.

The plaintiff was a courier who used his own vehicle to make deliveries for M Ltd. He was responsible for his own expenses, including fuel costs.

The plaintiff chose his own work hours on the days that he chose to work. On the afternoon of the accident, the plaintiff called M Ltd.'s dispatcher to advise that he was going to complete one last delivery and then book off for the day. The plaintiff made the delivery and was on his way home when the accident occurred. On his way home, the plaintiff intended to get gas for his vehicle and do other personal errands.

Board policy considers a worker to be in the course of employment when he is required to drive a vehicle to and from work for the purposes of the employment, except when a distinct departure on a personal errand takes place en route. The Panel concluded that this distinct departure test was inapplicable to the facts of this case. There can only be a departure from one's employment duties if there is an intention to return to those duties once the personal errand has been completed.

Once the plaintiff had completed the tasks to which he had referred in his conversation with the dispatcher, his employment had ended for the day. At that point he was no longer in the course of his employment. There was no employment from which he could depart. [9 pages]

WCAT Decisions Considered: Decision No. 872/87 distd

Board Directives and Guidelines: Operational Policy Manual, Document no. 03-02-03

DECISION NO. 238/91 (10/06/91) Strachan Felice Jago

Continuing entitlement.

The worker suffered back injuries in April and July 1979. The worker appealed a decision of the Hearings Officer denying entitlement for subsequent back problems.

The Panel found that the worker's condition had resolved by August 1980. There was a lack of continuity of complaint from 1980 until 1983 when the worker was involved in a non-compensable motor vehicle accident. The appeal was dismissed. [11 pages]

DECISION NO. 26/88R (11/06/91) Strachan Ferrari Preston

Reconsideration.

The worker's request to reconsider Decision No. 26/88 was denied. New evidence did not establish a causal connection between the worker's back disability and an accident in 1982. [5 pages]

WCAT Decisions Considered: 26/88L reld to, 26/88 consd

DECISION NO. 568/90 (11/06/91) McIntosh-Janis McCombie Meslin

Suitable employment - Supplements, temporary - Transitional provisions (commencement).

The worker had been employed for over 30 years as a mason and steeplejack, prior to his injury in 1985. When injured, he was performing unskilled labour, but was doing so with the expectation that an opportunity to perform skilled work would become available. He was receiving an 18% pension for back, shoulder and arm injuries. The worker was generally co-operative and was eager to undertake assessment and rehabilitation programs.

In February 1989 the worker completed a 16 week training program in building maintenance which taught him how to perform minor electrical/plumbing repairs, general carpentry work and floor/carpet care. He understood that this type of work would pay at least \$15 dollars per hour or up to \$9 per hour with a free apartment. The worker was seeking work with larger firms in the building maintenance field, when, in April

1989, his rehabilitation counsellor advised him that she had found cleaning jobs for him that paid \$7.50 per hour. The worker refused this work. The Board then terminated his temporary supplement.

The Panel found that the cleaning jobs were not suitable for the worker's capabilities and that his refusal therefore did not disentitle him from continuing to receive temporary supplementary benefits. The duties of the job offered had little to do with the training received and there was no indication that accepting this job might lead to an opportunity for a building maintenance job with this employer in the future. The worker was not waiting for the perfect job. This was the first refusal of a job by the worker and only two months had passed since he had completed his training program. In these circumstances, the worker's refusal was not unreasonable.

Since the Board terminated the worker's temporary supplement as of July 6, 1989, but the Tribunal had now re-established the worker's entitlement to the supplement after that date, the effect of the coming into force of the transitional provisions of Bill 162 on July 26, 1989 had to be considered.

The Panel concluded that the worker's entitlement to a supplement under s. 45(5) of the pre-1989 Act must cease on July 26, 1989. Sections 133 and 134 of the transitional provisions, which state that s. 43(5) of the pre-1985 Act and s. 45(5) of the pre-1989 Act cease to apply on the date that the transitional provisions come into force, cannot affect a worker's accrued rights to entitlement under the old temporary supplement provisions up to July 26, 1989. However, after that date, entitlement must fall to be considered under Bill 162. The worker's entitlement to supplementary benefits, after July 26, 1989 should initially be dealt with by the Board. [12 pages]

Ss: 45(5) pre-1989, 133(2), 134(2)

WCAT Decisions Considered: Decision No. 512 (1986), 3 W.C.A.T.R. 182 consd; Decision No. 729/89 (1989), 12 W.C.A.T.R. 251 consd; Decision No. 916/89 (1989), 12 W.C.A.T.R. 279 consd; Decision Nos. 118 consd, 746/89 consd

Other Statutes Considered: Interpretation Act, R.S.O. 1980, c. 219, s. 14(2)(b)

DECISION NO. 223/91 (11/06/91) Signoroni M. Cook Nipshagen

Delay (treatment).

The worker appealed a decision of the Hearings Officer denying entitlement for a low back disability which the worker claimed was related to a fall at work.

The worker had a preexisting back condition. There was a delay in seeking treatment until two weeks after the accident at work. There was medical evidence that, if the work incident was a primary cause of disc prolapse, the features of the protrusion would likely have been present within a few hours to a few days. The Panel found that the work accident likely had some impact on development of the disc prolapse but that this impact was not significant.

The appeal was dismissed. [6 pages]

DECISION NO. 274/91 (11/06/91) Sandomirsky M. Cook Chapman

Pensions (assessment) (back) - Pensions (assessment) (leg).

The worker suffered serious injuries in November 1986 for which he was awarded an 11% pension, later increased to 21%. The worker appealed a decision of the Hearings Officer denying further increase in the pension.

The pension award was composed of 20% for low back disability and 1% for shortening of the leg. The

Panel found that the worker had low back disability and right leg disability. The 20% pension was adequate for the low back disability. However, the Board did not consider the leg symptoms as a separate disability. The worker was suffering additional functional loss limiting use of his right leg and associated pain. Compared to the Rating Schedule of 12% for complete denervation of the peroneal nerve, the Panel found that the worker was entitled to an additional 6% pension.

The appeal was allowed. [5 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to; Decision No. 23/89 reld to

DECISION NO. 361/91 (11/06/91) Bradbury Shartal Apsey

Withdrawal (of appeal).

The worker's widow appealed the denial of benefits which she claimed as a result of the worker's death from pulmonary edema and coronary atherosclerosis with angina pectoris. Before the Board, she had claimed that the death arose out of the worker's long-term exposure to nickel oxide dust. At the start of the hearing, a new issue was raised by the widow's representative as to whether the worker's death could have resulted from a relationship between the worker's heart attack and his employment activities shortly before his death.

The type of work performed by the worker just before his death was an important issue but it had not been investigated by the Board. The case was withdrawn from the Tribunal so that the widow could pursue this new issue with the Board. [3 pages]

DECISION NO. 390/91 (11/06/91) Faubert Rao Preston

Temporary total disability.

The worker appealed a decision of the Appeals Adjudicator granting only 50% temporary partial disability benefits from July 1984 to October 1985. On the evidence, the Panel found that the worker was temporarily totally disabled during the period. The medical evidence, including that of a Board doctor, supported this conclusion. The appeal was allowed. [7 pages]

DECISION NO. 404/91I (11/06/91) Strachan M. Cook Apsey

Notice of hearing.

The issue on an employer appeal was whether owner/operators of tractors were workers or independent operators. Considering the interest of the owner/operators and the employer's consent to giving them notice, the Panel directed that notice of the hearing be given to the owner/operators. [3 pages]

WCAT Decisions Considered: 208/90I apld

DECISION NO. 779/89 (12/06/91) Strachan McCombie Meslin

Pensions (assessment) (knee) (amputation equivalent) - Availability for employment (considering self totally disabled) - Temporary disability (beyond pension level).

In April 1972, the worker underwent non-compensable surgery to remove a synovial tumour and a Baker's cyst from his knee. In October 1972 he aggravated the synovitis when he bumped his knee at work. He underwent a synovectomy for villonodular synovitis in March 1974. He was granted a 10% pension in October 1975. A patellectomy was performed in 1983. The pension rating was gradually increased. He was now appealing the award of a 35% rating for his knee.

The worker stopped working in June 1985 and began receiving temporary total benefits. In December 1985 they were reduced to 50% because the worker would not agree to look for work with anyone other than the accident employer. In February 1986 the temporary benefits were terminated. In April 1987 the worker was awarded an older worker supplement. The worker was now claiming entitlement to total temporary benefits from December 1985 to April 1987, or at least 50% benefits from February 1986 to April 1987.

The medical evidence supported the Board's conclusion that the worker could perform modified work. The worker maintained that he was totally disabled and refused to search for any modified work. This justified a reduction in temporary benefits to 50% from December 1985 to February 1986. The worker's condition had reached a plateau by February 1986. Absent any deterioration of the condition and absent co-operation by the worker, the Board's decision to terminate temporary benefits in February 1986 also should not be disturbed.

The 35% rating recommended for the worker on a December 1987 examination was equivalent to a below-knee amputation, even though no amputation existed. The medical evidence indicated that, in addition to below-knee difficulties, there were equal, if not greater, problems above the knee. There was a six centimetre wasting of the quadriceps and a finding that quadriceps tone was almost completely gone.

The worker was in a great deal of pain and could not walk or get out of a chair without a cane. The "amputation equivalent" approach was appropriate. The worker's injury was comparable to a mid-thigh amputation and should be rated at 50%, retroactive to the December 1987 examination. [13 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 apd; Decision No. 407/88 (1989), 12 W.C.A.T.R. 30 apd

DECISION NO. 235/90 (12/06/91) Signoroni Lebert Jago

Accident (occurrence) - Procedure (submissions) - Evidence (during submissions).

The worker appealed a decision of the WCB Appeal Tribunal denying entitlement for a back injury which he claimed he suffered in an accident at work in 1958.

The employer's representative was unable to participate in the hearing due to illness. At his request, he was given the opportunity to file written submissions. These submissions contained some evidence. The Tribunal does not, as a rule, engage in lengthy debates over complex rules of admissibility of evidence. Rather, factors such as source of evidence, manner in which it was obtained and manner in which it was introduced to the Panel, would affect the weight to be attached to the evidence. The Panel considered the evidence in the submissions on this basis.

On the evidence, the Panel found that the worker did suffer an accident at work in 1958. The appeal was allowed. [11 pages]

WCAT Decisions Considered: 408/87 reld to

DECISION NO. 382/91 (12/06/91) Strachan Higson Preston

Class of employer (cable television service) - Class of employer (broadcasting).

The employer appealed a decision of the Hearings Officer that the employer's business of transmitting television signals was correctly classified under Rate Group 773 covering firms engaged in the provision of cable television services.

The employer purchased signals which it received by antenna. These signals were transmitted by satellite to subscribers. The subscribers are regional cable television companies which would send the signal by cable to their customers.

The Panel found that the employer did not come within the criteria for Rate Group 773 since it did not provide cable television service via cable. In addition, it did not provide outside field work such as installation and repair of cable facilities.

The employer was also a 3% shareholder in a company that held equity interests in various local cable companies. This investment did not provide sufficient link between the employer and local cable companies to justify classifying the employer as an operator of a cable television service.

Rate Group 940 primarily related to industries where occupations are of a professional nature. A number of the employer's competitors engaged in broadcasting were classified in this rate group. The Panel concluded that the employer should be classified in Rate Group 940. The appeal was allowed. [12 pages]

Regulations Considered: Reg. 951, Schedule 1 class 22, class 25

DECISION NO. 911/90 (13/06/91) Marafioti Ferrari Preston

Suitable employment.

The worker suffered compensable tendonitis of the shoulder in 1984. He returned to modified work. After a flare-up, he returned to work in June 1988 but was not provided with modified work. The worker appealed a decision of the Hearings Officer denying benefits subsequent to June 1988.

On the evidence, the worker was still partially disabled during the period in question and needed modified work. He was available for modified work but the employer did not provide suitable work. The appeal was allowed. [5 pages]

DECISION NO. 412/91 (13/06/91) McIntosh-Janis M. Cook Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a number of irrelevant references. [3 pages]

DECISION NO. 413/91 (13/06/91) McIntosh-Janis M. Cook Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a number of irrelevant references. [4 pages]

DECISION NO. 866/87R (14/06/91) Signoroni B. Cook Preston

Procedure (reconsideration) (inactive employer) - Reconsideration (error of facts) (absent parties) - Credibility.

The worker applied for reconsideration of Decision No. 866/87 in which the employer's appeal was allowed and benefits for an accident on May 8, 1984, were denied. The worker was not present at the appeal. Credibility was the central issue to the appeal and the original hearing panel came to the conclusion that the worker was trying to avoid or postpone the hearing for improper purposes. In fact, the worker missed the hearing due to the death of his father in Europe. It was not clear why the worker had not been able to communicate the reason for not attending to the hearing panel.

The worker's legitimate reason for absence led the Panel to conclude that it should seriously contemplate reopening Decision No. 866/87. Normally, the employer would now be asked for submissions. However, the employer was no longer active. In these circumstances, the Panel granted the application for reconsideration and reheard the merits of the appeal. The Panel subpoenaed the witnesses who testified at the original hearing and obtained transcripts of prior proceedings.

The worker claimed entitlement for injuries suffered in an unwitnessed accident on May 8, 1984. The employer claimed that the worker was terminated on May 7, effective immediately. The worker submitted that the termination was to be effective after completion of two jobs on which the worker was working. There was a great deal of contradictory and inconsistent evidence. The Panel preferred the evidence of the employer. The worker's evidence had more inconsistencies than that of the employer. In addition, the employer's evidence was given without benefit of opportunity to refresh his memory by review of the documentary record. The worker's evidence contained inconsistencies on practically every important point in the case.

The Panel found that the worker was terminated on May 7. Accordingly, he was not a worker within the meaning of the Act at the time of the alleged accident on May 8. The appeal was dismissed. [15 pages]

WCAT Decisions Considered: 866/87I reld to, 866/87 consd

DECISION NO. 621/89 (14/06/91) Kenny Lebert Jago

Stress - Arteriosclerosis - Medical opinion (arteriosclerosis) (stress) - Worker (contract of service) - Police - In the course of employment (proceeding to and from work) - Jurisdiction, Tribunal (final decision of Board).

The worker was a chief of police. He appealed a decision of the Appeals Adjudicator denying entitlement for a heart condition which he related to either the stress of his employment or an accident in 1968. He also appealed a decision of the Hearings Officer denying entitlement for injuries suffered in an accident in 1986.

In a preliminary matter, Tribunal counsel raised the issue of whether the chief of police was a worker

within the meaning of the Act. Although this issue had not been raised previously, the Tribunal had jurisdiction to consider it since it was a central part of the issue of entitlement to compensation.

Decision No. 1153/87, which considered provisions of the Police Act and found that a chief of police was an employer, dealt with the relationship between the chief of police and a police officer who was under his direction. It did not deal with the relationship between the chief and the city. The Panel found that the chief of police was a worker within the Act.

The worker began to suffer from angina in 1976 and underwent bypass surgery in 1979. The Panel found that a compensable motor vehicle accident in 1968 did not cause the worker's arteriosclerosis. A mechanical cause was ruled out because of the distribution of the arteriosclerotic lesions throughout the worker's coronary tree.

The Panel also found that the arteriosclerosis was not caused by job stress. The scientific basis for a relationship between stress and arteriosclerosis was speculative. More importantly, the medical evidence in this case indicated that the degree of stress from work was not exceptional and that there was no basis for finding that stress caused the condition. It was likely that the arteriosclerosis was caused by non-compensable factors common to the general population.

In 1968, the worker fell and suffered injuries as he was walking to work from his home. He was wearing his uniform but was not carrying a gun. The worker considered himself to be in the course of employment while walking to work. He would deal with accidents or other problems that he saw en route. There was evidence that the police commission wanted the chief to be highly visible and wear his uniform whenever possible. In the circumstances, the Panel found that the worker was in the course of employment at the time of the accident.

The appeal with respect to the heart condition was dismissed. The appeal with respect to the injuries suffered in the fall was allowed. [18 pages]

WCAT Decisions Considered: Decision No. 229 (1986), 2 W.C.A.T.R. 118 reld to; Decision No. 483 (1988), 8 W.C.A.T.R. 44 reld to; Decision No. 516/87 (1987), 5 W.C.A.T.R. 168 reld to; Decision No. 638/89I (1989), 12 W.C.A.T.R. 221 reld to; Pension Assessment Appeals Leading Case Interim Report (1986), 7 W.C.A.T.R. 365 reld to; Decisions No. 321 reld to, 1153/87 consd, 55/89I reld to, 487/89I reld to Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-14-02

Other Statutes Considered: Police Act, R.S.O. 1980 c. 381

Cases Considered: Decision No. 2 (1973), 1 B.C.W.C.R. 7 reld to; Wang v. City of Miami Springs et al., 249 So. 2d 3 (1971) reld to

DECISION NO. 353/91I (14/06/91) Onen Lebert Jago

Adjournment (referral to Board).

The worker was appealing the award of a 3% pension for organic disability. There were references in the file to psychogenic factors. The hearing was adjourned and the case was referred to the Board to consider entitlement for chronic pain. [4 pages]

DECISION NO. 360/91 (14/06/91) Hartman Robillard Chapman

Continuing entitlement.

The worker appealed a decision of the Appeals Adjudicator denying entitlement for three periods in 1980. The worker suffered compensable injuries in 1967 and 1977. On the evidence, the Panel found that the worker

also suffered another injury in 1980. The lay-offs in 1980 were to employment duties during 1980. The appeal was allowed. [8 pages]

DECISION NO. 387/91 (14/06/91) Strachan M. Cook Meslin

Aggravation (preexisting condition) - Benefit of the doubt.

A postal clerk appealed a decision of the Hearings Officer denying entitlement for a right heel condition. For one shift per week, the worker did manual sorting of oversized mail. This required standing for most of the shift. The worker developed a bony prominence at the back of the heel bone. The worker's left leg had been amputated more than 20 years earlier as a result of a non-compensable accident.

Considering the medical evidence, the Panel found that the bony prominence did not result from employment. However, the worker's employment, together with altered gait from the amputation, may have put additional stress on the right leg, aggravating the heel cord and resulting in a form of bursitis. Applying the benefit of the doubt in favour of the worker, the Panel found that work aggravated the worker's preexisting condition.

The appeal was allowed. The worker was entitled to payment for special orthopaedic shoes which relieved his pain. [9 pages]

DECISION NO. 405/91 (14/06/91) Onen Shartal Apsey

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 406/91L (14/06/91) Onen Shartal Apsey

Leave to appeal (substantial new evidence) (medical report).

The worker applied for leave to appeal an Appeal Board decision denying continuing benefits for a back disability. New medical reports submitted by the worker were not substantially different from reports before the Appeal Board. There was evidence to support the Appeal Board conclusion.

Leave to appeal was denied. [5 pages]

DECISION NO. 414/91 (14/06/91) Signoroni B. Cook Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 415/91 (14/06/91) Signoroni B. Cook Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 416/91 (14/06/91) Signoroni B. Cook Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 362/91 (17/06/91) Bradbury Shartal Apsey

Continuing entitlement - Benefit of the doubt.

The worker appealed a decision of the Appeal Board denying entitlement for a back condition subsequent to August 1978. The worker suffered a fractured fibula in 1976 and a low back injury in 1977.

Specialists have been unable to diagnose exactly what was causing the worker's continuing back pain. However, the majority of specialists related it to the compensable accidents. Board doctors felt that the continuing pain was not related to the accidents. The Panel found the evidence evenly balanced. Applying the benefit of doubt in favour of the worker, the Panel found that the continuing back pain resulted from the compensable accidents. The appeal was allowed. [7 pages]

WCAT Decisions Considered: 398/87L *reld to*

DECISION NO. 785/88RI (18/06/91) Sandomirsky Lebert Apsey

Reconsideration (procedural error) - Natural justice (procedural error) (full and fair hearing) - Board Directives and Guidelines (permanent disability) (impotence) - Impotence - Impairment of earning capacity.

The worker applied for reconsideration of Decision No. 785/88. The worker had appealed a decision of the Hearings Officer finding that his claim for sexual dysfunction had been considered by the Board when his pension was increased from 15% to 30%. In Decision No. 785/88, the hearing panel found that the impotence did result from compensable surgery and that it had not been considered by the Board in assessing the pension. However, the hearing panel concluded that there was no evidence that impotence, in and of itself, resulted in an impairment of earning capacity and the worker's appeal was dismissed. The hearing panel also found that the Board policy on impotence was not in keeping with the requirements of s. 45 of the pre-1989 Act.

The Panel found that there was a denial of natural justice at the original hearing. The worker understood the issue on the appeal to be the proper rating for his compensable disability. He did not have an opportunity to address the issue of the compensability of impotence.

Further, in any case in which a panel overturns a Board policy, and where the parties are relying on that policy, the parties should be given the opportunity to bring evidence and submissions on the legality of

that policy. The Board should, generally, also be given an opportunity to explain its policy.

The request to reconsider was granted. The Tribunal Counsel Office was directed to arrange a new hearing. [7 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decision No. 1248/87R (1989), 11 W.C.A.T.R. 103 reld to; Decision No. 785/88 consd

DECISION NO. 278/91L (18/06/91) Chapnik Shartal Barbeau

Leave to appeal (good reason to doubt correctness) (evidence to support Appeal Board conclusion).

The worker applied for leave to appeal a decision of the Appeal Board denying entitlement for a recurrence of back pain which the worker claimed was related to a compensable injury. There was evidence to support the Appeal Board conclusion that the back pain was not related to the compensable accident.

Leave to appeal was denied. [4 pages]

WCAT Decisions Considered: 109 reld to

DECISION NO. 342/91 (18/06/91) Signoroni Jackson Shuel

Rehabilitation, vocational (cooperation).

The worker suffered a bilateral wrist condition in 1987. He was awarded full benefits until January 1990. The worker appealed a decision of the Hearings Officer granting only 50% benefits from January 1990 to June 1990.

The employer terminated the worker's employment after the accident. After a grievance, he was reinstated in June 1989. However, because of limited seniority and medical restrictions, he was unable to resume employment. By January 1990, it was clear that he would not be able to resume employment with the accident employer and that it was time to expand his job search, as requested by the rehabilitation counsellor. On the evidence, the Panel found that the worker did not cooperate with rehabilitation. Accordingly, he was not entitled to full benefits. The appeal was dismissed. [5 pages]

DECISION NO. 364/91 (18/06/91) McGrath Rao Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a number of irrelevant references. [3 pages]

DECISION NO. 365/91 (18/06/91) McGrath Rao Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 366/91 (18/06/91) McGrath Rao Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 927/90 (19/06/91) Bradbury B. Cook Apsey

Class of employer (manufacturing) (chemicals) - Class of employer (manufacturing) (foundry facings) - Class of employer (industry test).

The employer appealed a decision of the Hearings Officer reclassifying part of its operations from Rate Group 405 to Rate Group 137. The employer manufactured heat-resistant liners for the foundry industry and for the steel industry.

Rate Group 405 includes manufacturing of chemicals and chemical products. Rate Group 137 includes manufacturing of foundry facings. The auditor based the reclassification on the rate groups of competitors and legislative requirements.

Information regarding the employer's competitors was limited. The Board did not provide details about their business or classification. The employer had obtained information that their classification was changed back to Rate Group 405. The Panel found that the comparison to competitors was not a satisfactory basis for changing the employer's classification in this case since it was possible that the competitors' classification had been changed back and since the employer's business was highly specialized, so that it would be difficult to compare to other companies without further details.

Section 5(1) of Reg. 951 provides that in determining rates for an employer, an industry should be regarded as a unit. Board policy provides that industries should be determined based on end product or service. However, end products are often not named in the definition of rate groups. Where more than one product is produced and the operation is intermingled, the preponderant part of the operation should be considered. When the end product is not listed in the rate groups, the type of product and the manufacturing process should be considered.

In this case, the end product was not listed in the rate groups. To produce its products, the employer mixed over 300 different chemicals. The Panel found that chemical preparation in Rate Group 405 was the best description of the employer's process. In addition, based on its NEER assessment, it appeared that the employer belonged in Rate Group 405. The appeal was allowed. [11 pages]

WCAT Decisions Considered: 927/90I reld to

Regulations Considered: Reg. 951, ss. 5(1), 5(2), Schedule 1 class 6, class 12

Board Directives and Guidelines: Operational Policy Manual, Document no. 08-03-03, 08-03-05

DECISION NO. 938/90 (19/06/91) Moore Higson Nipshagen*Overpayment - Referral to Board.*

In Decision No. 938/90I, the Panel requested submissions on the issue of overpayment. The Panel decided to refer the issue of overpayment back to the Board. The overpayment was substantial and the Board contemplated dealing with the question. The board has a special expertise in the area and should have the opportunity to deal with it. [4 pages]

WCAT Decisions Considered: Decision No. 182 (1988), 10 W.C.A.T.R. 1 reld to; Pension Assessment Appeals Leading Case Interim Report (1986), 7 W.C.A.T.R. 365 reld to; Decision No. 373/90 (1990), 15 W.C.A.T.R. 202 reld to; Decisions No. 566/90 reld to, 792/90 reld to, 938/90I reld to

DECISION NO. 876/89A2 (20/06/91) Faubert Jackson Nipshagen*Medical examination (section 21) (provision of report to worker) - Jurisdiction, Tribunal (section 21) (provision of report to worker).*

The worker attended a medical examination requested by the employer pursuant to s. 21. In this decision, the Panel considered the worker's entitlement to the report.

The parties and Tribunal counsel all agreed that the provisions of s. 21(2) were sufficiently broad to permit the Tribunal to make an order requiring the employer to release the report to the worker. The Panel noted that Rule 33 of the Rules of Civil Procedure sets out the procedure for a party who wishes to obtain a medical report pursuant to s. 118 of the Courts of Justice Act, 1984, and provides in Rule 33.06(2) that the party who obtained the order must give the report to the other parties. The same considerations underlying that rule to make the report accessible to the person undergoing the examination, applied here, and perhaps more so because of the investigative nature of proceedings under the Workers' Compensation Act.

The employer had submitted the report to the Board. Although the worker could apply for access under s. 77, it should not be necessary to do so.

The Panel also found that the worker should not be required to contribute to the employer's cost of obtaining the report. First, the worker could obtain it free by applying under s. 77. Secondly, policy considerations suggested that the worker should not be put to any financial disadvantage because of the employer's s. 21 application.

The Panel directed the employer to release the report to the worker. [6 pages]

Ss: 21(2)

WCAT Decisions Considered: Decision No. 434 (1987), 4 W.C.A.T.R. 183 consd; Decision No. 876/89A reld to
Other Statutes Considered: Courts of Justice Act, 1984, S.O. 1984 c. 11, s. 118, Rules of Civil Procedure (O. Reg. 560/84), Rules 33, 33.02(2), 33.06

DECISION NO. 289/91 (20/06/91) Newman Ferrari Apsey

Supplements, temporary - Impairment of earning capacity - Significantly greater than is usual (advantaged worker) - Issue setting (consolidation of issues).

The worker injured his wrist in December 1983 and was granted a pension in August 1986. The current rating of his pension was 9%. The worker sought supplementary benefits for the period from June 1988 to June 1990.

Before continuing with the hearing, the Panel obtained the assurance of the worker that he did not intend to appeal the 9% rating and that the hearing could proceed on the basis that the 9% award adequately reflected the usual level of impairment caused by this disability. (This was without prejudice to the worker's right to seek an increased pension should there be a deterioration of his condition).

A clear understanding of the degree of disability is crucial to the determination of entitlement to supplementary benefits. From a public administration point of view, effective and efficient implementation of the Act requires an approach which encourages the consolidation of outstanding issues in a claim file. Where possible they should be presented in one proceeding. Had the worker expressed an interest in challenging the pension rating, the Panel would have required that the issue be consolidated into this proceeding, even if jurisdictional restrictions would have meant referring the matter to the Board for a decision first.

In determining the threshold question as to whether the worker's impairment of earning capacity was greater than usual, prior Tribunal decisions have looked at factors such as the worker's age, education, communication skills, English language skills, and work experience, so as to determine whether they create barriers to the worker's re-employment which require the extra support that a supplement can offer.

Examination of this worker's personal factors revealed socio-economic advantages that the average unskilled worker did not have. He was young energetic, bright, well-educated, articulate and assertive. These circumstances lessened the impact of the worker's disability on his earning capacity, relative to the impact on the average unskilled worker. He did not have to rely on a strong wrist to attain full earning capacity.

Had he chosen to, the worker could have matched his pre-accident income using his intellectual and verbal skills, rather than his physical skills. He instead chose to pursue self-employment, as was his right. The worker and his wife owned a real estate development business which owned valuable property. Though the business may not as yet have been generating any cash flow the worker's potential and capacity to earn income remained high. The worker failed to meet the threshold test that would entitle him to supplementary benefits. [13 pages]

Ss: 45(5) pre-1989

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 consd; Decision No. 495/88 (1988), 10 W.C.A.T.R. 241 distd; Decision No. 603/88 (1989), 13 W.C.A.T.R. 73; Decision No. 97/87 consd

DECISION NO. 337/91 (20/06/91) McGrath Higson Preston

Withdrawal (of appeal).

The appeal was withdrawn to allow the worker to pursue further issues at the Board. [3 pages]

DECISION NO. 344/91 (20/06/91) McGrath Higson Meslin*Continuity (of symptoms).*

The worker suffered a right knee injury in May 1981, a low back injury in September 1981 and a left knee injury together with exacerbation of the back condition in March 1982. In 1987, the worker claimed further benefits for bilateral osteoarthritis of the knees. The worker appealed a decision of the Hearings Officer denying further entitlement.

A review of the medical reports indicated that there was continuity of knee symptoms from 1982 to 1987. The worker was a credible witness. The Panel found that the accidents were a significant contributing factor to the osteoarthritis. The appeal was allowed. [7 pages]

DECISION NO. 402/91 (20/06/91) McCombie Ferrari Nipshagen*Epicondylitis - Medical opinion (epicondylitis).*

The worker had been granted entitlement for bilateral carpal tunnel syndrome and trigger finger of the left hand. He now claimed that the nature of his job had caused his left tennis elbow. His job involved grinding excess metal from cars moving down an assembly line, using a 20 pound grinder balanced by a ballast system.

The Board denied entitlement for tennis elbow based on the opinion of its doctor that the work was compatible with problems arising in the flexor group of muscles in the forearm, but that the extensor muscle group would not necessarily be sufficiently aggravated to produce tennis elbow. There was medical evidence that using a grinder involves the extensor muscles, as well as the flexor muscles, so as to maintain the grinder in position. According to this evidence, tennis elbow could result from the static positions of the extensor tendons when held in a stressed condition for prolonged periods of time.

The Panel found that, on balance, the evidence supported a relationship between the worker's tennis elbow condition and his work. He was thus entitled to benefits. [6 pages]

WCAT Decisions Considered: Decision No. 22/90 consd

DECISION NO. 215/87R2 (21/06/91) Bigras B. Cook Nipshagen*Reconsideration.*

The worker's request to reconsider Decisions No. 215/87 and 215/87R was denied. [5 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decision No. 850/87R (1990), 14 W.C.A.T.R. 1 reld to; Decisions No. 72R reld to, 72R2 reld to, 215/87 reld to, 215/87R reld to

DECISION NO. 489/88R (21/06/91) Moore Robillard Barbeau*Reconsideration (consideration of evidence).*

The worker's request to reconsider Decision No. 489/88 was granted. The hearing panel did not appear to deal with a number of medical reports which found that the compensable accident contributed to the worker's ongoing disability.

It is not necessary for a panel to address each piece of evidence but a panel should address significant medical evidence that appears to support a claim that the panel is rejecting. In this case, the hearing panel accepted the view of one specialist who saw the worker twice over the view of several doctors who saw the worker on numerous occasions. The hearing panel should have dealt with this evidence in a comprehensive manner. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decisions No. 72R reld to, 72R2 reld to, 489/88 consid

DECISION NO. 865/90 (21/06/91) Bigras M. Cook Meslin*Second Injury and Enhancement Fund - Vertigo.*

In December 1986, the worker received a blow in the area of the left ear from a flying metal object. At that time, post-concussional syndrome was diagnosed. Vertigo and headaches persisted. The worker was granted a 5% pension as his positional vertigo precluded him from working at heights or jobs that involved changes in position.

The employer appealed a decision denying SIEF relief. The worker had sustained a concussion in a June 1977 motor vehicle accident that resulted in some continuing vertigo and headaches. However, the worker had been symptom-free since March 1978. The Panel accepted the opinion of a neurologist that the worker's prolonged symptoms were caused by a predisposition which was aggravated by the work accident.

The worker's pre-accident condition continued for nine months, subsided and did not reappear. The pre-existing condition was thus of moderate severity. The work accident did not cause any fracture, but led to an undetermined cerebral disturbance which caused mild and intermittent vertigo. It was also of moderate severity. In such cases the employer is entitled to 50% SIEF relief, according to Board policy.

The employer also appealed a decision finding that the worker continued to be disabled by the compensable injury after February 1988. The employers grounds were the worker's own psychological disposition and the vertigo resulting from the 1977 accident.

Though there were medical opinions on file that the worker's psychological disposition would impede his rehabilitation, this was not borne out by the subsequent history of the case. The worker embarked on an active job search upon discharge from HRC, completed a real estate course and found employment as a real estate agent, though it ultimately proved unsuccessful. There was no lack of motivation on the worker's part resulting from his disposition.

The worker had been free of vertigo symptoms relating to the car accident for seven years prior to the occurrence of the work accident. Whether the worker's continuing symptoms resulted entirely from the new accident, were enhanced by a preexisting condition or were an aggravation of a preexisting condition, the worker was entitled to compensation. The continuing impact of the car accident was only relevant to SIEF relief and not to the worker's continuing entitlement after February 1988. [15 pages]

Board Directives and Guidelines: Claims Services Division Manual s. 108 (2), p. 235, Directive 1; Claims Adjudication Branch Procedures Manual, Document no. 33-28-03

DECISION NO. 170/91 (21/06/91) Hartman Robillard Apsey

Temporary disability (beyond pension level).

The worker injured his back in April 1985. He unsuccessfully attempted to return to work in September 1985 and in November 1985. In February 1988 the worker was awarded a 20% pension retroactive to the date of the accident. The worker sought temporary benefits for back problems during the period from November 1985 to March 1988.

The worker was not entitled to temporary benefits for back problems during the period from November 1985 to March 1988. He had been receiving treatment for a back condition prior to the April 1985 accident. The medical evidence at the time characterized the worker's condition as chronic incapacitation, which was inconsistent with a temporary flare-up. The worker was not disabled beyond his pension level during the period in question.

Labour relations difficulties were a more plausible explanation, than the effects of the accident, for the worker's inability to return to his job as a production line foreman. He had been experiencing problems with the job and his plant manager's accusations blaming him for problems on the line, prior to the accident. [10 pages]

DECISION NO. 171/91 (21/06/91) Hartman Robillard Apsey

Continuity (of treatment) - Strains and sprains (ankle).

The worker sprained his ankle in a compensable accident in June 1986. He again sprained his ankle in a non-compensable accident in December 1987. X-rays taken at the time of the second accident indicated the presence of bone chips and surgery was performed in March 1988. The worker sought entitlement for the lost time that resulted from the surgery.

The worker lost no time from work between June 1986 and December 1987. The worker did not seek medical attention for continuing ankle problems during this period despite seeking attention for other conditions. The Panel found that the worker did not have symptoms of any consequence during this period. The medical evidence did not lead the Panel to conclude that the surgery in March 1988 was causally related to the 1986 compensable accident.

The worker was not entitled to benefits. [9 pages]

DECISION NO. 375/91 (21/06/91) Bigras Shuel Drennan

Medical examination (section 21).

The worker applied for an order that she should not be required to attend a medical examination requested by the employer. The worker was a postal clerk who suffered a low back disability from unloading a mail truck. She had returned to work but had a number of recurrences.

The employer wanted the medical examination to determine the type of modified work necessary to meet the worker's medical restrictions. The examination was important to achieving a valid compensation goal.

The application was denied. The worker was required to attend the examination. [4 pages]

DECISION NO. 446/91I (21/06/91) McCombie B. Cook Barbeau

Issue setting - Jurisdiction, Tribunal (final decision of Board).

The employer was appealing the worker's entitlement to various periods of full and partial temporary benefits after December 1986, granted by the Hearings Officer. The worker had suffered a work injury in July 1986. In August 1987 the worker was granted a 10% one-year psychological pension. In June 1989 the psychological award was increased to 30% for three years.

The employer took the position that the worker's psychological condition was not at issue in this appeal. The worker took the position that he should have been paid full temporary benefits during all periods under appeal.

Given the Board's recognition of a significant non-organic component to the worker's condition, it would not be practicable to attempt to determine the worker's degree of compensable disability while ignoring that component. The whole person approach should be adopted notwithstanding that initial entitlement for the psychiatric award had never been determined by the Board at the Hearings Officer level. The issues on this appeal, and before the Hearings Officer, were whether the worker continued to be disabled, by reason of the accident, for the periods in question and to what benefits was the worker entitled. The Tribunal thus had jurisdiction.

The hearing was adjourned. On the reconvened hearing the issue agenda was to include whether the worker was temporarily disabled during the periods in question, either by an organic or non-organic condition resulting from the accident, and the level of any benefits to be paid any if disability was found. [5 pages]

DECISION NO. 537/89 (24/06/91) Moore Heard Preston

Disablement (vibrations) (tools) - Mining (drilling) - Carpal tunnel syndrome.

The worker appealed a decision of the Appeals Adjudicator denying entitlement for carpal tunnel syndrome. The worker was a miner. He used drills infrequently since 1967 and retired in 1971 due to a number of compensable and non-compensable disabilities. The first reported symptoms of carpal tunnel syndrome were noted in 1974.

The Panel accepted medical evidence that it was unlikely that drilling work would have caused or aggravated carpal tunnel syndrome, especially considering the delay in onset of symptoms. The appeal was dismissed. [12 pages]

DECISION NO. 153/90 (24/06/91) Bigras McCombie Nipshagen

Disablement (exposure).

A tool and die maker appealed a decision of the Hearings Officer denying entitlement for a skin rash, diagnosed as pityriasis rubra pilaris, and bilateral cataracts. On the evidence, the worker was not exposed

to materials which could cause the rash or the cataracts. The worker had been working at this job for nine years before the onset of symptoms. Removal from the workplace did not ease the worker's condition. The appeal was dismissed. [5 pages]

DECISION NO. 16/91R (24/06/91) Moore Beattie Preston

Reconsideration - Rehabilitation (cooperation).

The employer applied to reconsider Decision No. 16/91. In Decision No. 16/91, the Panel found that the worker was totally disabled and that, even if he was partially disabled, he was not disqualified from receiving full benefits for failing to attend treatment at a distant facility.

The employer submitted that this decision was inconsistent with Board policy which provides that benefits can be suspended for failure to attend prescribed treatment. The Panel found that its decision was consistent with the Act. The Board's policy should be interpreted as allowing suspension of benefits for total disability only if the failure to follow treatment could be considered to be an intervening event.

The application to reconsider was denied. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decisions No. 72R reld to, 72R2 reld to, 16/91 consid
Board Directives and Guidelines: Operational Policy Manual, Document no. 05-04-05

DECISION NO. 183/91 (24/06/91) Bigras Jackson Chapman

Supplements, temporary - Suitable employment.

The worker suffered a low back injury in 1984 for which she was awarded a pension in April 1986 and a supplement. The worker appealed a decision of the Hearings Officer denying the temporary supplement subsequent to January 1987.

The Board terminated the supplement after the worker laid off from a job after 10 days. On the evidence, the Panel found that the job was not suitable for the worker. The Board had some familiarity with the workplace but not with the specific job the worker was doing. The Panel accepted the worker's evidence of increasing pain from the job.

The appeal was allowed. [8 pages]

Board Directives and Guidelines: Claims Services Division Manual, s. 45(5), p. 134, Directive 1

DECISION NO. 391/91II (24/06/91) Hartman Shartal Meslin

Adjournment (addition of representative).

The worker attended the hearing expecting to be represented by the same person that represented him before the Hearings Officer. However, there was a change in union affiliation and the worker received a new representative. This new representative asked the Tribunal's Appeals Administrator for an adjournment but the request was denied. The representative did not attend the hearing.

The hearing was adjourned. The Panel recommended that the worker obtain a different representative. [4 pages]

DECISION NO. 307/8913 (19/06/91) Newman Lebert Preston

Procedure (replacement of panel member) - Natural justice (replacement of panel member) - Natural justice (oral hearing).

In Decision No. 307/891, the original hearing panel made findings of fact and gave instructions for proceeding. In Decision No. 307/8912, it was recommended, in view of the fact that two of the original panel members had to be replaced, that a new panel be convened to complete the case. In this decision, the new panel considered how to proceed. The employer submitted that the panel should hear the entire case over again.

Section 80(1) provides that a panel must give full opportunity for a hearing. Section 79(1) provides that the Tribunal shall determine its own practice and procedure. The usual procedure is to proceed by full, oral hearing. However, that is not a statutory requirement. Rather, the statute gives the flexibility for the Tribunal to choose the manner of proceeding in each case, in order to ensure that the goals of the legislation are served.

Further, the rules of natural justice do not require that a full, oral hearing be held in every case. In addition, in the circumstances of this case, the rules of natural justice do not require a full oral hearing. Rehearing the testimony of the witnesses would not significantly contribute to the quality of the evidence available to the Panel. In fact, it could create a situation of unfairness to the worker by allowing the employer a second opportunity to structure and present its case.

Decision No. 307/891, in which the findings of fact were made, is a decision representing the culmination of an exercise in statutory authority. These findings of fact cannot be disregarded. Any reconsideration of the findings of the original panel should be only on basis of the approach of the Tribunal regarding reconsiderations.

The hearing would reconvene to hear submissions after the Panel has considered the transcript and exhibits of the original hearing. If any further evidence is required, the Panel will make the necessary rulings. [13 pages]

Ss: 79(2), 80(1)

WCAT Decisions Considered: 307/891 *reld to*, 307/8912 *reld to*

Cases Considered: Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69 (1990), 68 D.L.R. (4th) 524 (S.C.C.) *consd*; Diamond v. Hickling (1988), 36 Admin. L.R. 129 (B.C.C.A.) *consd*; Murphy v. Dowhaniuk (1986), 22 Admin. L.R. 81 (B.C.C.A.) *consd*

DECISION NO. 437/90 (24/06/91) Moore B. Cook Ronson

Pensions (assessment) (wrist).

The worker appealed a decision denying him a pension for a hand disability with respect to a July 1986 accident. He sustained a severe laceration to the top part of his hand that went down to, but did not involve, the tendons. The worker was receiving a 1.5% pension for prior injuries that led to surgical procedures and amputation of the little finger.

The Panel accepted as determinative the well-thought-out report of the s. 86 assessor which was based on a comprehensive examination of the worker. Its analysis was consistent with and explanatory of the worker's subjective complaints. This report established that the worker had permanent damage to the median and ulnar nerves of the injured hand, resulting in both motor function and sensory deficits. His functional

limitations included clumsiness, weakness, unco-ordination and numbness.

The Rating Schedule benchmarks provide for a 20% award for median denervation complete at the wrist and 8% for ulnar denervation complete at the wrist. The Panel found that the worker had the functional equivalent of 50% denervation up to the wrist involving both median and ulnar nerves. The worker was thus entitled to half of the combination of the above-mentioned awards.

The worker was granted a 14% pension. [8 pages]

DECISION NO. 300/91 (24/06/91) Moore Jackson Jago

Rehabilitation, vocational (academic training) - Psychotraumatic disability - Supplements, transitional provisions (benefit from rehabilitation) - Supplements, transitional provisions (permanent) - Supplements, transitional provisions (temporary).

The worker injured his back in May 1981. He was granted a 10% pension in July 1982, increased to 15% in October 1989.

The Board sponsored the worker in a two-year community college insurance adjuster program. The worker completed the program in 1985, but spent the next three years unsuccessfully trying to find work in that field. On the suggestion of his psychiatrist, in October 1989, the worker asked the Board to sponsor him in a community college social service worker program. On August 28, 1990 that request was denied by the Board's vocational rehabilitation division. The worker nonetheless entered the program which began in September 1990. He was doing well in the program and was under consideration for a position upon graduation.

The worker developed psychological problems one year after the accident and received psychiatric treatment for a while in 1983. His condition improved while he was receiving training in the insurance adjuster program, but upon its completion his psychiatric problems gradually reappeared. The worker began seeing his psychiatrist on a regular basis in March 1988.

The worker was granted a 25% provisional psychiatric award in December 1988. In September 1990 a Board Technical Adviser determined that the psychiatric award should never have been granted in the first place and that award was rescinded. At that time the worker was granted a s. 135(4) supplement.

The worker appealed the Board's denial of sponsorship in the social service worker training program and the rescission of his 25% provisional award.

The Panel found that the worker met the requirements for formal training. He had met the college's entry requirements and he had done well on tests administered by the Board's rehabilitation division. He had successfully completed the prior Board-sponsored course. The Board's statements about the worker's emotional instability were speculative. The worker's response to the Board's denial of his request was understandable, considering that it did not come until one week before the course was to commence and the alternative offered by the Board was unrealistic and based on vague, unwarranted preconditions. The delays in the rehabilitation division considering the training request came from within the Board and not from any failure by the worker. The worker was thus entitled to sponsorship under s. 54 of the Act.

The worker's entitlement to the s. 135(4) supplement was based on the premise that he was unlikely to benefit from a vocational rehabilitation program. The Panel's finding with respect to entitlement to formal training negated that premise. However, the worker was entitled to a supplement under s. 135(2), as the evidence indicated that the worker had an opportunity for employment which, combined with his pension, would approximate his pre-accident earnings as a punch press operator.

The Board's decision to rescind the worker's 25% psychiatric award was incorrect. The evidence of the worker's attending psychiatrist was clear that a relationship existed between the worker's depression/phobia and the compensable accident. The evidence did not support the Board's finding that the worker's ongoing

depression resulted from his preexisting personality. The worker was thus entitled to a two-year provisional award up to December 1990. Entitlement to any further pension, provisional or otherwise, should be determined by the Board. [17 pages]

Ss: 135(2), 135(4)

WCAT Decisions Considered: Decision No. 442/90 apd

DECISION NO. 322/91 (24/06/91) Moore Ferrari Chapman

Exposure (fumes) - Causation (medical evidence).

The worker was exposed to fumes from an overheating transformer during the course of his seven hour shift. That day, he experienced dizziness and lightheadedness. Over the next few days he felt extreme fatigue and lapsed frequently into episodes of sleep, sometimes for prolonged periods. The worker claimed benefits for the few days of work that he missed.

There was no clear medical evidence as to whether the worker's disability arose out of the exposure or some other cause. However, there was other evidence that allowed the Panel to reach a decision on the preponderance of the evidence. The worker's symptoms began during the course of his employment and there was continuity of symptoms. Some other workers suffered similar symptoms over a similar period of time following the exposure. None of the co-workers took time off work or claimed compensation benefits. Common sense dictated that the exposure was a significant contributing factor. The fact that this worker's symptoms were more severe than those of his co-workers did not alter the existence of the relationship between the exposure and the worker's disability.

The worker was entitled to benefits. [7 pages]

DECISION NO. 392/91 (24/06/91) McIntosh-Janis Ferrari Ronson

Suitable employment - Available employment (offer from accident employer).

The worker sustained a compensable neck and right shoulder injury in January 1986. Most of the doctors advised against any unsupported use of the right arm. The worker unsuccessfully tried modified work with the accident employer, in May 1986, that involved peeling rubber labels from a board and moving them to another board. The worker found that the labels stuck to the board, requiring considerable effort to pull them off without stretching them. She also had to use her right arm to stabilize the board.

In late 1989, an official of the accident employer advised the worker of the availability of light work. This work, as described to the worker, appeared to be the same job that she had attempted in May 1986. The employer claimed that the job had changed and that further modifications were available. A letter to the Board mentioned the employer's flexibility, but this was never adequately communicated to the worker. It thus was reasonable for the worker to assume that the 1989 job was substantially the same as the 1986 job which had aggravated her compensable conditions.

In any event, since the board could not otherwise be stabilized, so as to preclude the need for the use of the worker's right arm to stabilize it, the worker would not have been able to efficiently perform the required duties without exceeding her medical restrictions.

The worker had not refused suitable work in 1989 and was entitled to temporary benefits until the time her pension began. [8 pages]

DECISION NO. 396/91 (25/06/91) Robeson Robillard Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 23/91 (26/06/91) Sandomirsky Klym Meslin

Suitable employment.

The worker suffered a right shoulder injury in August 1983. He returned to modified work in November 1985 but stopped working after two days. He continued to receive temporary benefits until December 1986 while the Board investigated the question of the suitability of the work. The worker appealed a decision of the Hearings Officer denying temporary benefits subsequent to December 1986.

The worker had medical restrictions against above-shoulder lifting over 20 pounds and against repetitive lifting. The modified work involved buffing bumpers with a light hand-held buffer and then carrying the bumpers, weighing 50-60 pounds, to a nearby skid. On the evidence, the work was within the worker's restrictions. There was no above-shoulder lifting. Moving the bumpers was done with the help of a co-worker and did not require repetitive lifting.

Even though a job is within a worker's medical restrictions, it can still be unsuitable due to conditions peculiar to the worker involved. In this case, the Panel found that the work was suitable. The appeal was dismissed. [8 pages]

DECISION NO. 219/91 (26/06/91) Hartman Shartal Jago

Travel expenses (treatment).

The worker suffered a compensable injury in 1975 for which he was awarded a 30% pension. The worker appealed a decision of the Hearings Officer denying reimbursement for travel expenses from his home in St. Catherines to see his orthopaedic specialist in Brampton for two visits in 1989 and 1990.

At this time, the specialist was not offering active treatment. Rather, the doctor was providing reassurance and support. Such support and reassurance was available in St. Catherines from either general practitioners or specialists. The worker was not precluded from seeing the doctor of his choice. However, he was not entitled to reimbursement for the cost of travelling to see this specialist in Brampton. If, in the future, he requires specific treatment by a specialist and he is directed by a doctor to seek treatment from the specialist in Brampton, the question of payment for travel would have to be considered again.

The appeal was dismissed. [8 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 06-01-03

DECISION NO. 418/91 (26/06/91) McGrath M. Cook Howes

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 419/91 (26/06/91) McGrath M. Cook Howes

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a number of irrelevant references. [3 pages]

DECISION NO. 420/91 (26/06/91) McGrath M. Cook Howes

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 463/91 (26/06/91) Kenny M. Cook Chapman

Continuity (of symptoms).

The worker did heavy manual labour. He suffered compensable injuries in 1975 and 1978. The worker appealed a decision of the Hearings Officer denying entitlement for further disability in 1985. On the evidence, the worker's condition did not return to its pre-accident state after the 1978 accident. That accident was a significant contributing factor to his ongoing disability. The appeal was allowed. [7 pages]

DECISION NO. 707/90 (27/06/91) McIntosh-Janis Robillard Sutherland

Medical opinion (epilepsy) - Epilepsy.

The worker fell in December 1982. He sustained a fractured jaw and complained that his ability to recall dates and details was affected. In April 1983 he had convulsions while sleeping. In January 1987 he collapsed from a seizure at work.

The Panel accepted that the delay between the fall and the seizures did not preclude entitlement to compensation. It further accepted that even a minor head injury can cause subsequent epilepsy. However, it could not conclude, on the balance of probabilities, that the work injury suffered by this worker substantially contributed to his two epileptic seizures.

The worker sustained no brain injuries, no loss of consciousness and very little, if any, associated amnesia. These are the classical criteria for determining whether there is a relationship between a particular head trauma and subsequent epilepsy. No justification was provided for not considering these criteria as being determinative of the claim. The worker was not entitled to benefits. [9 pages]

WCAT Decisions Considered: Decision Nos. 653 consd, 926/88 consd

DECISION NO. 764/90 (27/06/91) Hartman Lebert Nipshagen
Richardson Terminals Ltd. v. Canadian Pacific Ltd.

Section 15 application (third party claims) - Damages, contribution or indemnity - Words and phrases (action s. 15) - Employer (Schedule 1 and 2 employers).

The worker died in the course of his employment, when he was run over by a railway car allegedly operated by a certain railway company. The worker's employer was a Schedule 1 employer, while the railway was a Schedule 2 employer. The worker's widow received s. 36 benefits. The Board commenced an action against the railway with respect to the subrogated rights of the widow, under s. 8(4). The railway then brought third party proceedings against the employer.

The railway did not dispute the employer's request for a declaration under s. 8(11) that no damages, contribution or indemnity were recoverable from the employer as a result of the worker's death. However, the railway did dispute the employer's request for a declaration that the railway was barred from proceeding with its third party claim against the employer.

Under s. 15, the Tribunal has jurisdiction to discontinue an action where Part I of the Act takes away the right to bring an action. The word "action", in the context of the Workers' Compensation Act, is broad enough to include a third party action, considering the definition of that word in the Courts of Justice Act, 1984.

The employer paid into the Accident Fund and in return received protection from claims by its workers under s. 14 and by other Schedule 1 workers or employers under s. 8(9). There is no community of interest, under the Act, between Schedule 1 and Schedule 2 employers, comparable to that which exists among Schedule 1 employers under s. 8(9). Nothing in the Act establishes that the Legislature intended to address business relationships or other circumstances giving rise to third party claims between Schedule 1 and Schedule 2 employers. Nothing in Part I gave the Panel the statutory authority to declare that the third party action by the railway against the employer was taken away.

Section 8(11) applied in this situation. Though the railway's third party action was not an action brought under s. 8(1) or s. 8(4), the main action which gave rise to the third party claim was. In this case the employer had not been removed from the action under s. 8(9), rather, it had been added by the railway and remained a party to the action. Despite the reference in the closing words of s. 8(11) to an employer who "... is not a party to the action", the Panel concluded that s. 8(11) is not limited in its application to situations where s. 8(9) has been applied to remove a defendant.

The Board's subrogated right to recover against the railway was limited by s. 8(11). No damages could be recovered from the railway for negligence attributed to the Schedule 1 employer. [14 pages]

Ss: 8(9), 8(11), 15

WCAT Decisions Considered: Decision No. 335 (1987), 4 W.C.A.T.R. 149 apld; Decision No. 53/87 (1987), 5 W.C.A.T.R. 97 reld to; Decision No. 432/88 (1988), 9 W.C.A.T.R. 306 reld to; Decision No. 701/88 (1989), 11 W.C.A.T.R. 150 reld to; Decision Nos. 314 reld to, 360 consd, 961/87 reld to

Other Statutes Considered: Courts of Justice Act 1984, S.O. 1984, c.11, s. 1; Rules of Civil Procedure, O. Reg. 560/84, Rule 29.01

Cases Considered: Sinkovitch v. Canadian Pacific Railway Co., [1954] O.W.N. 21 (Ont. H.C.J.) consd; Averletti v. Meertens, [1968] 2 O.R. 864, (S.C.O. Master) consd; DiCarlo v. DiSimone, (1982) 39 O.R. 445, (Ont. H.C.J.) consd

DECISION NO. 905/90 (27/06/91) Bradbury Higson Barbeau*Psychotraumatic disability - Alcoholism.*

The worker appealed the denial of his entitlement to benefits for a psychotraumatic disability. He was receiving a 50% pension for a low back disability.

The evidence did not suggest that the worker was disabled by a psychological condition. He continued to perform activities around the house after the accident. It was the worker's 50% organic disability that prevented the worker from returning to work.

The worker suffered from mood swings, anxiety and depression that were related to his drinking problem. The worker testified that prior to the work accident he did not have a drinking problem, but that after the accident his drinking increased. However, the worker's records indicated that the worker had a longstanding prior history of heavy drinking. Anxiety neurosis, with references to suicidal thoughts, was diagnosed one year prior to the accident.

The Panel concluded that the compensable accident did not make a significant contribution to the worker's problems of depression and mood swings. Any psychological problems following the accident were more likely related to the progression of the worker's alcoholism. The appeal was dismissed. [8 pages]

DECISION NO. 917/90 (27/06/91) Faubert Robillard Chapman*Hearing loss (traumatic).*

A wood cutter was struck on the head by a falling tree in 1956. His file was reopened in 1983 after one of his doctors sent a report to the Board. The worker appealed a decision of the Hearings Officer denying entitlement for hearing loss, headaches and dizziness.

The Hearings Officer relied on reports of Board doctors who were under the impression that the accident was not severe since the worker returned to work the day after the accident. However, the Panel found that the accident was serious but that the worker was not the type of person to complain of his physical problems.

Based on the medical evidence, including that of a s. 86h assessor, the Panel found that the worker suffered a longitudinal fracture of the base of the skull causing a longitudinal fracture of the temporal bone and resulting in damage to the otic capsule. The worker also suffered from symptoms of chronic ear disease which likely resulted from perforation of the tympanic membrane at the time of the head injury.

The appeal was allowed. The worker was entitled to benefits for hearing loss and chronic ear disease. The Panel did not deal with the compensability of the headaches and dizziness. [20 pages]

Appendices: Report of a s. 86h assessor concerning head injuries, hearing loss and chronic ear disease

DECISION NO. 318/91 (27/06/91) Moore Ferrari Chapman*Dupuytren's contracture - Aggravation (preexisting condition) (Dupuytren's contracture) - Medical opinion (Dupuytren's contracture) - Disablement (repetitive work).*

The worker was an autoworker who repaired trim on auto bodies. The worker appealed a decision of the Hearings Officer denying entitlement for Dupuytren's contracture. The worker submitted that the condition was aggravated by his job, which required extensive use of his hands.

The Panel found no medical evidence to support the worker's claim. There was medical opinion from an expert that there was no evidence that manual work aggravates existing Dupuytren's contracture. At most, there was some evidence that a single traumatic injury might lead to premature appearance of the condition. The worker's job did not involve the kind of trauma that could aggravate the condition.

The appeal was dismissed. [9 pages]

WCAT Decisions Considered: Decision No. 280 (1987), 6 W.C.A.T.R. 27 reld to; Decision No. 559/87 (1988), 9 W.C.A.T.R. 103 reld to; Decision No. 652/87 (1988), 10 W.C.A.T.R. 75 consd; Decisions No. 710 reld to, 300/88 reld to, 434/88 reld to, 304/90 reld to

DECISION NO. 352/91 (27/06/91) Faubert Jackson Meslin
Oram v. Simpson

Section 15 application - Schedule 1 employer (for profit or gain) - Class of employer (catering).

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken away. The issue was whether the plaintiff's employer was included within the operation of the Act. It did not report to the Board at the time the plaintiff was involved in a motor vehicle accident.

The employer was a non-profit corporation with a volunteer board of directors. Its primary service was a "meals on wheels" programme for seniors. It purchased the meals from a hospital, packed them in boxes and delivered them to seniors.

The Panel found that the employer was a Schedule 1 employer within the catering provision in Class 25 item 6 of Reg. 951. However, the employer was excluded from the operation of Part I of the Act by s. 4(a) of the regulation since it was a charitable organization which had no intention to profit.

Since the plaintiff was not entitled to compensation under the Act, her right of action was not taken away. [10 pages]

WCAT Decisions Considered: Interim Decision No. 417 (1986), 2 W.C.A.T.R. 149 reld to; Final Decision No. 417 (1986), 3 W.C.A.T.R. 154 reld to; Decisions No. 525 distd, 284/90 distd

Regulations Considered: Reg. 951, s. 4(a), Schedule 1 Class 25 item 6

DECISION NO. 381/91 (27/06/91) Faubert B. Cook Meslin
Spinks v. Jaouhari

Section 15 application - Independent operator (courier) - Worker (test) (business reality).

The defendants in a civil action applied to determine whether the plaintiff's right of action was taken away. The issue was whether the plaintiff was a worker or independent operator at the time of a motor vehicle accident.

The plaintiff worked for a courier company. He owned his own vehicle and was responsible for operating and maintaining it. He received 75% of the value of the deliveries he made. There was no flat fee or guaranteed minimum payment. He was not prohibited from driving for other companies and, although he did not do so, some other drivers did work for other companies as well.

In the circumstances, the Panel found that the plaintiff was an independent operator. The plaintiff's right of action was not taken away. [14 pages]

WCAT Decisions Considered: Decision No. 921/89 (1990), 14 W.C.A.T.R. 207 consd; Decision No. 759/90 consd
Board Directives and Guidelines: Determination of Worker/Independent Operator Status: Impact of the Organizational Test, Board Minute 8, December 6, 1990, p. 5410

DECISION NO. 430/91L (27/06/91) Strachan Jackson Chapman

Leave to appeal (good reason to doubt correctness) (consideration of evidence).

The worker sought leave to appeal an Appeal Board decision denying him continuing benefits after February 1977. He sustained a compensable leg disability in a March 1976 accident, when a piece of wood fell on his thigh and knee. In March 1989 he was granted a 10% provisional chronic pain award and he received a temporary supplement from July 1989 to September 1990. He sought benefits from 1977 up to the retroactivity date for chronic pain.

With the benefit of hindsight, additional medical reports and recent Board adjudication, the worker's chronic pain condition was now recognized. However, the source of this condition, whether organic, non-organic or mixed, remained undetermined. Whether the knee pain was in fact referred pain from the thigh also remained undetermined.

The Appeal Board failed to analyze or comment on a diagnosis of post-traumatic fibrositis or the effect of nerve compression resulting from the soft-tissue injury to the thigh. Considering the relatively restrictive enquiry by the Appeal Board and the contents of more recent medical reports, the Panel concluded that there was good reason to doubt the correctness of the Appeal Board decision. Leave to appeal was granted. [6 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 consd

DECISION NO. 452/91 (27/06/91) McIntosh-Janis Robillard Preston

Rehabilitation, vocational (cooperation).

The worker suffered multiple injuries in a fall in 1982. The worker appealed a decision of the Hearings Officer granting only 50% temporary partial disability benefits from February 1984, when he was discharged from HRC to modified work, until September 1985, when he was assessed for a pension.

Subsequent to this period, the worker was also awarded a 15% pension for psychotraumatic disability retroactive to the date of the accident, in addition to pensions totalling 27% for organic disability. The worker's cooperation with rehabilitation and availability for employment has to be considered in light of the later finding of psychotraumatic disability. In the circumstances, the Panel found that the worker was entitled to full benefits during the period in question. The appeal was allowed. [5 pages]

DECISION NO. 459/91 (27/06/91) Strachan Shartal Ronson

Issue setting.

The hearing was adjourned to allow the worker to pursue other issues at the Board. When final decisions on those issues are received, the appeal could proceed to consider the issues on a whole person basis. [3 pages]

DECISION NO. 1272/87 (28/06/91) Kenny Fuhrman Jago (dissenting)

Climate (draught) - Chronic pain - Causation (thin skull doctrine) - Significant contribution (of employment to disability) (subjective reaction of worker).

The worker appealed denial of benefits for bilateral wrist and elbow disabilities, for neck, upper back, shoulder and head disabilities and for psychotraumatic disability. The Hearings Officer found that the psychological problems developed as a result of the physical problems and that the physical problems were not compensable.

The worker had been working for the employer for 12 years when she stopped working in September 1978. She submitted that she was disabled by a condition resulting from a cool and draughty work environment. The Panel seriously questioned the work relatedness of the worker's condition, considering the lack of medical evidence suggesting a relationship between draughty conditions and long term muscular problems, the worker's inaccurate perception of her working conditions and her psychological condition. However, the majority of the Panel concluded that, at the time she laid off, the worker was suffering from a pain condition resulting from a combination of psychological and physiological responses to her work environment.

There were varying diagnoses and explanations for the worker's condition. The consensus of non-Board doctors was that the condition arose out of employment. The work environment was not sufficiently cold or draughty that the work environment alone would cause long term physical problems. The work environment would not cause discomfort to most people. However, the worker felt cold. In response to feeling cold, it would be expected that there would be a temporary increase in muscle tension which could cause pain in the areas of tension. However, a combination of physical factors (the duration of the work conditions for eight years and the repetitiveness of the work) and psychological factors (her belief that she was being disabled and her belief that the employer was insensitive to her complaints) combined to fixate the worker's symptoms.

The worker's primary complaint was pain. The Panel found that the worker's condition could best be described as chronic pain syndrome.

The majority found that the worker's condition was compensable. Even if the worker had a psychological vulnerability, her condition would still be compensable. The worker had a mistaken belief as to how cold and how draughty the workplace was. Although she did not have a normal reaction to the environment, the environment was a significant cause of the disability.

The appeal was allowed. The worker was entitled to temporary benefits from September 1978 to January 1979 during which time there were some physical findings, and to benefits for chronic pain subsequent to March 27, 1986.

The Employer Member, dissenting, found that the disability did not arise out of employment since it resulted from her mistaken belief that the workplace was cold and draughty. [37 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to; Decision No. 915A (1988), 7 W.C.A.T.R. 269 reld to; Decision No. 559/87 (1988), 9 W.C.A.T.R. 103 reld to; Decision No. 669/87F (1989), 11 W.C.A.T.R. 54 reld to
Cases Considered: Review of Decisions No. 915 and 915A (1990), 15 W.C.A.T.R. 245 (WCB Bd. of Directors) reld to

DECISION NO. 134/91 (28/06/91) Newman Ferrari Preston

Continuity (of complaint)

The worker suffered a right shoulder injury in 1985. Three years later, he required shoulder surgery. The employer appealed a decision of the Hearings Officer granting entitlement for continuing shoulder problems and the surgery.

There was evidence that the minor accident in 1985 would not have caused rotator cuff tears but it could have caused impingement syndrome. There was recorded continuity of complaint by the worker's doctor. The Panel concluded that the accident aggravated a preexisting degenerative condition and led to the need for surgery. The appeal was dismissed. [9 pages]

DECISION NO. 426/91 (28/06/91) Faubert M. Cook Apsey

Pensions (assessment) (fibromyalgia) - Supplements, temporary - Availability for employment (job search).

A cashier suffered a back disability in 1981 for which she was awarded a 15% pension in 1983. The worker appealed a decision of the Hearings Officer denying an increase in the pension and denying a temporary supplement subsequent to October 1984.

The worker's complaints had not changed significantly since she was first assessed for a pension in 1983. She had pain between the shoulder blades which went up into the neck and down her back to her hips. The Panel found that the primary element of the worker's disability was pain. The Panel accepted the evidence of two doctors that the worker was suffering from fibromyalgia. The worker came within Category 2 of the Rating Schedule for psychotraumatic disabilities, which was applicable for fibromyalgia. The Panel confirmed the 15% pension, which was consistent with the impairment that the worker suffered from the fibromyalgia.

The worker was entitled to a supplement subsequent to October 1984. The worker's job search was adequate considering the small community in which she lived and her inability to drive long distances.

The appeal was allowed in part. [13 pages]

WCAT Decisions Considered: 23/89 reld to

Board Directives and Guidelines: Operational Policy Manual, Documents no. 03-03-03, 03-03-05

DECISION NO. 453/91 (28/06/91) McIntosh-Janis Robillard Preston

Issue setting.

The hearing was adjourned to allow the worker to pursue the issue of chronic pain at the Board. If the appeal is later pursued at the Tribunal, it could be dealt with on a whole person basis. [4 pages]

DECISION NO. 458/91 (28/06/91) McIntosh-Janis Robillard Preston

Suitable employment.

The worker suffered a left knee injury in 1986. He returned to work in October 1989 with a number of medical restrictions including restrictions against prolonged standing and walking. The worker stopped working after four days due to aggravation of his condition. The worker appealed a decision of the Hearings Officer denying benefits subsequent to October 1989. On the evidence, the worker's job was not suitable since it required prolonged standing and walking. The appeal was allowed. [4 pages]

DECISION NO. 369/91I (02/07/91) Newman Higson Preston

Pensions (assessment) (back) - Jurisdiction, Tribunal (final decision of Board) - Chronic pain.

The worker fell and suffered a lumbar sprain in January 1984. She received temporary total benefits for two years and then temporary partial benefits for four months. She was assessed for a pension in June 1986, but there was no evidence found of an organic disability which would support a permanent award. The worker was assessed again in June 1990 and this time a 15% award was granted. The employer appealed this award.

The medical opinions on record were unanimous that the worker's complaints were inconsistent with organic findings. The symptoms described by the worker at the hearing were different than those reported by the examining physicians. The Panel concluded that the worker's continuing complaints of pain were not due to an organic cause. The medical reports consistently emphasized the subjective element of the worker's reports. If any disability continued, it was due to non-organic causes.

The Panel disagreed with the employer's contention that if the worker was to be granted benefits because of a non-organic cause a new claim must be initiated, investigated and adjudicated through the Board's usual channels. It was within the Tribunal's jurisdiction to determine the worker's entitlement to a pension, based on any remaining consequences of the work accident, whether due to organic or non-organic causes.

Where the medical evidence has established that there is no organic or psychotraumatic condition, and a panel is satisfied that the worker's persistent pain is genuine, the panel is qualified to identify a chronic pain condition without a medical opinion that actually labels the condition as such. However, in this case, the Panel felt that it would benefit from an external medical opinion on the possible causes of the worker's continuing complaints of pain. The Panel directed that an assessment of this worker by a s. 86h assessor be arranged. [10 pages]

WCAT Decisions Considered: Decision No. 912/90I (1991), 17 W.C.A.T.R. 310 apld

DECISION NO. 188/90 (03/07/91) Onen Jackson Meslin

Apportionment - Transfer of costs - Negligence (occupiers' liability).

The accident employer appealed a decision of the Hearings Officer denying a transfer of costs of an accident to a second employer. The worker slipped and fell on ice in the parking lot of the second employer. The second employer operated an equipment rental business. The worker had gone there to pick up some equipment.

The common law of occupiers' liability had developed into a technical, complex and inadequate series of tests, categories and standards. The discrepancy between the test in occupiers' liability and the law of negligence in general was largely resolved by statutory reform in the Occupiers' Liability Act.

Panels of the Tribunal have interpreted s. 8(9) of the Workers' Compensation Act in the context of the Act and its policy purpose, to find the meaning to be given to the word "negligence". They were not bound to follow the common law test for negligence. They applied the test because the wording of the Act could reasonably bear that interpretation.

In the circumstances, it was reasonable to interpret "negligence" in accordance with the reform intended by the Occupiers' Liability Act. The Panel did not specifically apply the Occupiers' Liability Act nor was it bound to do so. Rather, it was guided in the interpretation of s. 8(9) by the fact that the Legislature expressed its intention to reform the common law of occupiers' liability by enacting the Occupiers' Liability Act.

There was a duty to exercise reasonable care. It was reasonable to expect a retail store to sand or salt the area where the accident occurred. It was not established on the evidence that the second employer did not place salt or sand.

It was not established that the second employer failed to exercise reasonable care. The second employer was not negligent. Therefore, the accident employer was not entitled to a transfer of costs. The appeal was dismissed. [13 pages]

Ss: 8(9)

WCAT Decisions Considered: Decision No. 716/87 (1987), 6 W.C.A.T.R. 242 consd; Decision No. 17/8912 (1990), 13 W.C.A.T.R. 118 consd
Other Statutes Considered: Occupiers' Liability Act, R.S.O. 1980 c. 322, ss. 2(1), 3(1), 9(2)

Cases Considered: Blyth v. Birmingham Waterworks Co. (1856), 11 Ex. 781 consd; Decision No. 114 (1975), 2 B.C.W.C.R. 85 reld to; Walldick v. Malcolm (1989), 70 O.R. (2d) 717 (C.A.) consd

DECISION NO. 42/91 (03/07/91) Onen Higson Nipshagen

Continuing entitlement.

The worker suffered a low back injury in March 1976 and returned to work in May 1976. The worker appealed a decision of the Appeals Adjudicator denying entitlement for a back condition in 1979.

On the evidence, the 1976 accident was not a minor one. In 1976, x-rays did not show any significant degenerative changes. In 1980, extensive degenerative changes were noted. It was reasonable to conclude that the extensive changes developed after the 1976 accident. Contradictions in the worker's evidence were explained by the worker's lack of ability in English and his inability to relate his history accurately.

The appeal was allowed. [9 pages]

WCAT Decisions Considered: 42/911 reld to

DECISION NO. 147/91 (03/07/91) McCombie M. Cook Jago (dissenting)

Temporary disability (beyond pension level).

The worker had been awarded a 10% pension for a low back injury in 1975. In April 1988 he suffered a recurrence and was awarded temporary benefits until April 1989, when the Board determined that he had returned to his pre-recurrence state. The worker sought temporary benefits from April 1989 to September 1989.

The majority of the Panel found that the worker was disabled at a greater than 10% level during the period in question. The worker was entitled to full temporary benefits during that period.

The family doctor reported total disability and refused to provide the worker with a note which would allow him to return to work with the accident employer after April 1989. It appeared that the worker's age (73 years at the time of the hearing) caused the worker's degree of disability to be discounted, but the worker returned to work, on his own efforts, in September 1989.

The Board, in part, based its decision to terminate temporary benefits on a report stating that there was no evidence to warrant a change in the permanent disability level. However, the level of permanent disability was not at issue in this hearing. This report was not evidence that the worker was no longer temporarily disabled beyond the 10% level.

The Employer Member, dissenting, was of the opinion that the evidence did not establish a level of disability greater than 10% during the period in question. [10 pages]

DECISION NO. 271/91I (03/07/91) Moore Jackson Clarke

Action (settlement) - Election (notice) - Subrogation - Time limits (election).

The worker suffered compensable back injuries in 1969 and 1976. In addition, she suffered an injury in 1980 when she was struck by a motor vehicle while walking on a public street leading from the employer's parking lot to the employer's plant. In 1987, she requested ongoing entitlement for a back condition which she related to these accidents. The Board's Legal Services Branch determined that the worker lost the right to claim for the 1980 accident pursuant to s. 8(2) and s. 8(3) since she received an unapproved settlement. The Hearings Officer did not find a causal relationship to the 1969 and 1976 accidents.

The worker was not aware that she had a right to claim benefits for the 1980 accident and she was only barely aware that money she accepted from the driver's insurance company was a settlement of a potential third party claim. The Panel applied Decision No. 282/90 and found that the worker was not deprived of her right to benefits under s. 8(2) since her settlement was not an informed settlement.

Pursuant to s. 8(6), an election under s. 8(1) must be made within three months. There is no time limit for claiming benefits. It would be inconsistent with the right to compensation to find that a worker would lose the right to benefits if no election is made within three months. The Panel concluded that the consequence of failing to make an election within three months is that the worker will be deemed to have elected benefits and thereby to have conferred the right of subrogation to the Board.

In this case, the worker did not lose her right to benefits under s. 8(2). However, the Board had not yet considered the issue of whether the 1980 accident arose out of and in the course of employment. The hearing was adjourned. The matter was referred to the Board to consider the compensability of the 1980 accident. After a final decision of the Board on that issue, the hearing would reconvene to consider ongoing entitlement for the back condition. [8 pages]

Ss: 8(2), 8(3), 8(6)

WCAT Decisions Considered: Decision No. 432 (1987), 4 W.C.A.T.R. 173 reld to; Decision No. 282/90 (1990), 17 W.C.A.T.R. 117 apld

DECISION NO. 447/91 (03/07/91) McCombie B. Cook Barbeau

Accident (definition of) - Injuring process - Angina pectoris - Aggravation (preexisting condition) (heart condition) - Overpayment.

The worker felt chest pains while performing physical labour at work. Extensive coronary occlusion was diagnosed and bypass surgery was performed within three months of the work incidents. The worker did not suffer a heart attack, but rather episodes of angina pectoris. He claimed that his underlying coronary condition was aggravated by the strenuous work.

The Panel was of the view that there was no "injury by accident" in this case. The definition of accident includes a sudden, unexpected internal injury. The angina which occurred at work was not the injury. In this case, the injury -- the occluding of the blood vessels -- was occurring on a progressive basis, uninfluenced by the work. The worker had a serious underlying coronary condition which may well have led to a fatal heart attack had the surgery not been performed. The disability was the coronary condition which required surgery. The onset of angina only signalled the need for surgery. This did not make the surgery compensable.

The Board had reimbursed the employer's disability insurance carrier for benefits paid to the worker. A large part of the overpayment could thus be recovered from the insurer rather than the worker. It was left

to the Board, subject to normal rights of appeal, whether to waive the part of the overpayment that was recoverable from the worker. [7 pages]

Ss: 3(1)

DECISION NO. 480/91 (03/07/91) Onen Shartal Preston

Withdrawal (of appeal).

The appeal was withdrawn to allow the worker to pursue the issue of chronic pain at the Board. [5 pages]

DECISION NO. 181/89 (04/07/91) Onen B. Cook Apsey

Hearing loss (impact noise) - Board Directives and Guidelines (hearing loss) (adequacy of standards).

In 1978, the Board accepted that the worker had suffered hearing loss as a result of work-related noise exposure. The worker changed duties in 1978 and worked at this new job until his retirement in 1984. The Hearings Officer denied the worker's claim for deterioration of his hearing after 1978, on the basis that the worker was then exposed largely to intermittent impact noise which was insufficient to cause hearing loss.

Board policy on hazardous noise exposure relates to continuous noise and does not specifically address impact noise. The Hearings Officer applied Ontario Ministry of Labour guidelines respecting impact noise. An expert witness gave evidence concerning the relationship between continuous and impact noise, their measurement and applicable standards. The Panel accepted that each of the existing separate standards (for continuous noise and impulse noise) currently in use in Ontario is inadequate when continuous and impulse noise are found together in the work place and that it is impossible to apply them together. Instead, the Panel chose to apply the general principles and tests outlined in the testimony of the expert witness.

The Panel took the results of workplace sound surveys conducted by the employer between 1978 and 1985, adjusted them for possible underestimations of actual noise exposure (including the inability of older sound meters and testing standards to measure the effect of impact noise and to integrate it into the results) and considered them as if they measured only continuous noise. These results were then applied to the standards set out in the Board policy. The results of the sound surveys were also adjusted to take into account the effect of the hearing protection worn by the worker from 1978 to 1984.

The Panel concluded that the majority of the worker's time was spent in an environment with sound below the hazardous 90 decibel level.

Tests of the worker's hearing indicated that there was little change between 1978 and 1983. There was no testing done at the time of retirement in 1984. Tests performed in 1985 showed a deteriorated level of hearing capacity and subsequent tests indicated continuing deterioration. In the absence of continuing exposure to noise, further loss of hearing generally cannot be attributed to noise.

The worker's loss of hearing, as reported in 1985, was not caused by exposure to hazardous noise at work. His appeal was dismissed. [24 pages]

Board Directives and Guidelines: Claims Services Division Manual, s. 122, p.270, Directive 19

DECISION NO. 1015/89 (08/07/91) Moore McCombie Preston

Impairment of earning capacity (subjective features) - Pensions (assessment) (psychotraumatic disability) - Apportionment (pensions) - Intervening causes - Rehabilitation, vocational (job search) (geographic location) - Post-traumatic stress disorder - Travel expenses (to hearing).

The worker was injured in a compensable fall in May 1971 when he was 40 years old. He was awarded a 10% pension for organic disability and a 50% pension for non-organic disability diagnosed as post-traumatic stress disorder. The worker appealed a decision of the Hearings Officer confirming the 50% pension for non-organic disability.

In September 1971, the worker returned to Nova Scotia. He lived in a relatively remote area where access to rehabilitation and employment opportunities was limited.

Section 43(1) of the pre-1985 Act provides that impairment of earning capacity should be estimated from the nature and degree of the injury. The worker submitted that, in a case such as this, the nature and degree of the injury must include psychosocial factors.

The Board is required to apportion pensions between compensable and non-compensable disabilities. Permanent psychiatric disabilities should be treated in the same way as any other permanent disability. Assessment of permanent psychotraumatic disabilities must be based on standards that include a consideration of the objective and subjective impact on an average unskilled worker with a similar disability. The Board's categories are intended to address subjective features of a psychological disability. Severing of non-compensable factors is appropriate only where the contribution of the non-compensable factors is so significant that the original injury plays a minimal role in the worsening of the disability.

The Panel agreed that subjective features should be considered in assessing a psychiatric disability. However, in this case, the subjective features that contributed to the worsening of the disability were non-compensable. After the accident, the worker was able to work for about four years at a number of different jobs. After that, his earning capacity diminished due to a number of factors: the post-traumatic stress disorder, age, lack of education, geographical isolation from employment prospects and rehabilitation, subjective acceptance of invalidism and reinforcement of the invalidism by his family. The Panel found that the two features which significantly contributed to the deterioration of earning capacity were age and isolation from employment prospects and rehabilitation.

Considering the existence of provision in the Act for older worker supplements, the Panel found that age was not intended to be a subjective feature in the estimate of an average unskilled worker's impairment of earning capacity. On the other hand, geographical isolation was a clear subjective feature which had a significant impact on the worker's unemployability. It limited potential employment prospects and contributed to the development of the psychosocial stressors. These untreated stressors were an important factor in the loss of earning capacity. The worker's isolation amounted to an intervening cause. Therefore, the worker was not entitled to an increased pension based on an increase of his impairment of earning capacity.

The 50% pension for non-organic disability would put the worker in the upper range of Category 3 of the Board's rating schedule for psychotraumatic disability. The worker submitted that an average unskilled worker in Category 3 or Category 4 would have no earning capacity. The Panel disagreed and noted that in fact this worker, who was rated in Category 3, was able to work for almost four years and may have continued to be employable if not for his age and isolation.

The appeal was dismissed. The Panel allowed travel expenses from Nova Scotia for the worker and his son, who drove and accompanied his father to the hearing, considering the significance of the issue on appeal and the usefulness of the worker's testimony. [24 pages]

Ss: 45(1) pre-1989 [43(1) pre-1985]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to; Decision No. 880/88 (1990), 14 W.C.A.T.R. 26 apld; Decision No. 1041/89 consd

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-02-20; Claims Services Division Manual, s. 71(3), p. 209, Directive 23

DECISION NO. 673/90 (08/07/91) Marafioti B. Cook Preston

Continuity (of treatment).

The worker struck his head in accidents in 1977 and 1983. The worker appealed a decision of the Hearings Officer denying entitlement for a neck condition in 1986. Although there was a lack of continuity of treatment, the Panel found that the worker's condition in 1986 was related to the compensable accidents, considering supportive medical reports and the worker's credibility. The appeal was allowed. [6 pages]

DECISION NO. 315/91 (08/07/91) Bigras Beattie Jago

Experience rating (CAD-7) - Employer (successor rights).

The employer appealed a decision of the Hearings Officer denying a CAD-7 experience rating credit for 1989. The employer sold the assets of the company to another firm in August 1989. One of the provisions of CAD-7 requires the firm's participation in the plan be open on December 30 of the preceding year.

The employer wrote to the Board in September 1989 advising of the sale and asking for the credit. The Board did not respond until 1990. There were a number of technical ways the employer could have kept its account open until the end of the year. The provisions of CAD-7 also provide that in cases of mergers or sales, the Board may determine the proper application of the plan in accordance with the intent and purpose of the plan. The Panel saw no purpose in punishing a safety-conscious employer for conducting business with the Board in an orderly and honest manner.

The Panel directed the Board to remit CAD-7 credits from January to August 1989 to the employer. The appeal was allowed. [6 pages]

WCAT Decisions Considered: Decision No. 296/90 (1990), 14 W.C.A.T.R. 346 consd

Board Directives and Guidelines: Operational Policy Manual, Document no. 08-05-02

DECISION NO. 397/91 (08/07/91) Bigras Robillard Seguin

Disablement (strenuous work) - Preexisting condition (spondylolysis).

The worker was a nursing assistant. She stopped working in August 1987 due to a back condition, diagnosed as symptomatic spondylolysis. The worker appealed a decision of the Hearings Officer denying entitlement.

Spondylolysis is a congenital defect. The worker claimed that her work as a nursing assistant aggravated the preexisting condition. The Panel found that the onset of symptoms of the condition resulted from a natural progression of the disease rather than from the nature of the worker's work. The worker had done similar work for 10 years. There were only a limited number of situations in which the worker would

have had to exert herself. She did not complain to co-workers or to superiors prior to leaving the job.

The appeal was dismissed. [10 pages]

WCAT Decisions Considered: Decision No. 72 (1986), 2 W.C.A.T.R. 28 reld to; Decision No. 652/87 (1988), 10 W.C.A.T.R. 75 consd

DECISION NO. 398/91 (08/07/91) Bigras Robillard Seguin

Pensions (assessment) (leg).

The worker appealed a decision of the Hearings Officer confirming a 10% pension for the worker's leg disability, diagnosed as deep venous thrombosis. Comparing the worker's disability with the Rating Schedule for leg disabilities, the Panel found that the 10% pension was reasonable. The appeal was dismissed. [7 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 apld

DECISION NO. 399/91 (08/07/91) Bigras Robillard Seguin

Disablement (nature of work) - Obesity - Postal workers (clerk) - Spondylolisthesis.

A postal clerk appealed a decision of the Hearings Officer denying entitlement for a back condition, diagnosed as spondylolisthesis and degenerative disc disease, which the worker related to standing and walking on hard cement surfaces.

The Panel found that there was not an injuring process associated with his employment that made a significant contribution to his disability. Many of the floors were covered with linoleum or rubber mats. In addition, the worker was able to sit while performing some of the functions of his job. Moreover, the walking and standing were not activities different from activities of daily living. There was no indication that the walking and standing at work were excessive.

Considering the worker's considerable weight and considering that standing and walking were not exclusive work activities, the Panel could not find that there was an injuring process arising from employment. The appeal was dismissed. [9 pages]

WCAT Decisions Considered: Decision No. 72 (1986), 2 W.C.A.T.R. 28 reld to; Decision No. 565 (1987), 4 W.C.A.T.R. 238 reld to; Decision No. 26/90 (1990), 15 W.C.A.T.R. 120 reld to

DECISION NO. 432/91 (08/07/91) Moore B. Cook Barbeau

Subsequent incidents (outside work).

The worker suffered a back injury at work on Friday, August 28. On Monday, August 31, he suffered a further back injury at home. The worker appealed a decision of the Hearings Officer denying benefits subsequent to August 31.

The Panel found that the incident on August 31 was a recurrence of the injury on August 28. The recurrence worsened the effect of the injury. There was a causal link between the two occurrences. The appeal was allowed. [6 pages]

DECISION NO. 464/91 (08/07/91) Kenny M. Cook Chapman

In the course of employment (on call).

The worker fell down stairs at home as she was going to get a briefcase to take to her employer's office. The worker appealed a decision of the Hearings Officer denying entitlement.

The employer provided homemaking services for clients. There were dispatch coordinators in the office during normal business hours. The worker was an "on call coordinator" who looked after any changes to the schedule from 5 p.m. to 9 a.m. She kept original dispatch sheets in the briefcase with her at all times, as well as a pager. Every morning she would take the briefcase back to the office for use by the dispatch coordinators. She was paid a flat rate for "on call" time.

The Panel found that the worker was in the course of employment at the time of the accident. She was "on call" at the time. She was taking the briefcase from the place in her home where she performed the employer's business to the employer's premises. Delivering the briefcase to the office was an integral part of her job and was important to the normal functioning of the employer's business.

The appeal was allowed. [7 pages]

DECISION NO. 642/90 (09/07/91) McIntosh-Janis Higson Howes

Accident (occurrence).

The worker appealed a decision of the Hearings Officer denying entitlement for a back injury that the worker claimed he suffered at work in October 1986. There was insufficient evidence to support the occurrence of an accident in October 1986. The date and time of the accident was unclear. There was a lack of corroboration from co-workers or doctors. There were inconsistencies in the worker's reports of onset of pain, as well as a delay in reporting.

The appeal was dismissed. [5 pages]

DECISION NO. 694/90 (09/07/91) McIntosh-Janis B. Cook Preston

Pensions (assessment) (chronic pain).

The worker suffered a back injury in 1964 for which he was awarded a 15% pension for organic disability. The Hearings Officer found that the worker was suffering from chronic pain but confirmed the 15% pension as being adequate to include the chronic pain. The worker appealed the decision of the Hearings Officer.

Shortly after the hearing, the Board replaced the rating schedule for chronic pain with the new Psychotraumatic and Behavioural Disorders Rating Schedule. The Panel arranged for the worker to be reassessed under the new schedule. Under the new schedule, the worker was rated at 25%.

The Panel found that the worker's disability was predominantly non-organic. Therefore, he should be rated under the new rating schedule for chronic pain. Impairment of the whole person is considered in the rating schedule. The Panel found that the Board took into account all aspects of the worker's disability.

The appeal was allowed. The worker was entitled to an increase in his pension from 15% to 25% effective March 27, 1986. [8 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to

Board Directives and Guidelines: Report on the Changes to the Chronic Pain Disorder Policy, Board Minute 10, October 5, 1990, p. 5398

DECISION NO. 922/90 (09/07/91) Bigras Beattie Jago

Temporary partial disability - Availability for employment (job search).

The worker suffered injuries in January and February 1986. The worker appealed a decision of the Hearings Officer denying benefits subsequent to October 1987, when the worker was discharged from HRC to regular employment.

On the evidence, the Panel found that the worker continued to be temporarily partially disabled subsequent to October 1987. However, he was not entitled to full benefits since he did not look for work. His condition became permanent by January 1990.

The appeal was allowed. The worker was entitled to 50% temporary partial disability benefits from October 1987 to January 1990 and to a pension assessment. [12 pages]

WCAT Decisions Considered: Final Decision No. 2 (1987), 4 W.C.A.T.R. 1 reld to; Decision No. 121 (1986), 3 W.C.A.T.R. 81 reld to; Decision No. 254 apld

DECISION NO. 296/91 (09/07/91) McIntosh-Janis M. Cook Chapman

Arising out of employment (assault).

The worker appealed a decision of the Hearings Officer denying entitlement for facial injuries. For about six months, a co-worker had been insulting the worker about his racial origin. On the day in question, the co-worker insulted the worker. The worker said that he was going to inform his foreman. The worker brushed by the co-worker as he attempted to pass the co-worker in a narrow hallway. The co-worker pushed the worker and punched him in the face.

The Panel found that the accident arose out of and in the course of employment. What really precipitated the assault was the worker's statement that he was going to complain to the foreman. Thus, there was a work element to the worker's purpose in passing the co-worker. Further, although the co-worker's insults could be considered personal, the only contact between the worker and co-worker was at work, and the co-worker was concerned about "foreigners" taking jobs away from "Canadians".

The work environment was a significant factor leading to the altercation. The accident arose out of and in the course of employment. The appeal was allowed. [14 pages]

WCAT Decisions Considered: Decision No. 245/90 (1990), 14 W.C.A.T.R. 331 consd; Decisions No. 952/89 reld to, 327/88 consd, 678/90 consd

DECISION NO. 325/91 (09/07/91) Bigras Robillard Howes

Hearing loss - Otosclerosis - Medical opinion (otosclerosis).

The worker appealed a decision of the Hearings Officer denying entitlement for hearing loss. It was accepted that the worker was exposed to hazardous noise. However, the Panel found that the worker's hearing loss was not noise induced but rather that it was caused by otosclerosis.

Otosclerosis is not caused by noise. The conductive component of hearing loss can be differentiated from sensorineural loss by means of the Cathcart notch. It may be possible for both conductive and sensorineural hearing loss to co-exist. However, in this case, the worker had bone conduction loss that was a variant of the Cathcart notch.

The appeal was dismissed. [8 pages]

DECISION NO. 909/87RI (10/07/91) Bigras B. Cook Barbeau

Reconsideration (new evidence).

The worker applied to reconsider Decision No. 909/87. The worker suffered injuries to her teeth. The Board paid for a partial bridge but not for a fixed bridge. In Decision No. 909/87, the hearing panel denied entitlement to health care benefits for the fixed bridge.

There was new evidence that the worker's partial bridge may have contributed to periodontal problems and that the fixed bridge also improved masticatory function considerably. The request to reconsider was granted. [5 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decision No. 850/87R (1990), 14 W.C.A.T.R. 1 reld to; Decisions No. 72R reld to, 72R2 reld to, 909/87 consid

DECISION NO. 247/90 (10/07/91) Moore McCombie Apsey

Recurrences (compensable injury).

The worker suffered a back injury in January 1984. The employer appealed a decision of the Appeals Adjudicator granting benefits for a recurrence in December 1984 when the worker was working for a second employer. The employer submitted that the back condition in December resulted exclusively from the worker's work with the second employer. The Panel found that there was continuity of symptoms and that the condition in December was a recurrence of the January injury. The appeal was dismissed. [6 pages]

WCAT Decisions Considered: 615/87I reld to, 247/90I reld to

DECISION NO. 613/90I (10/07/91) Moore B. Cook Apsey
Barton v. Air Ontario Inc.

Section 15 application - Class of employer (operation of airplanes) - Schedule 1 employer - Schedule 2 employer.

In this interim decision on a s. 15 application, the Panel considered whether the defendant airline was a Schedule 1 or a Schedule 2 employer at the time of an accident in 1989.

Since 1981, approximately 15% of the airline's scheduled service operated into the United States. The Board included the airline in Class 20, item 1(iv) of Schedule 1, which included "operation of aeroplanes". Since 1973, s. 10 of Schedule 2 included "an airline that has a regularly scheduled international passenger service".

Under s. 75(1) and (2)(a), the Board has power to designate who is a Schedule 1 employer. The Board classified the airline as a Schedule 1 employer and it remains a Schedule 1 employer until the Board determines otherwise. The fact that an industry could come under Schedule 2 does not preclude it from inclusion in Schedule 1. The Panel noted s. 7 of Reg. 951, which specifically authorizes inclusion of an industry in Schedule 1 even though it carries on some Schedule 2 activities. In addition, the Panel noted ss. 75(2)(b) and 96 of the Act, which confirm that inclusion in Schedule 2 is a determination to be made by the Board and that such inclusion requires a conclusion that the industry is not covered by Schedule 1.

It appeared that Schedule 2 was intended for airlines whose operations in Ontario were incidental to their principal interprovincial or international operations. The airline in this case clearly operated primarily within Ontario and was correctly classified as a Schedule 1 employer. [9 pages]

Ss: 75(2)(a), 75(2)(b), 96

Regulations Considered: Reg. 951: s. 7; Sch. 1 class 20, item 1(iv); Sch. 2 s. 10

DECISION NO. 780/90 (11/07/91) McIntosh-Janis Ferrari Ronson

Pensions (Rating Schedule) (chronic pain) - Pensions (assessment) (back) - Pensions (assessment) (knee) - Pensions (assessment) (leg) - Pensions (arrear).

The worker was receiving a 15% pension for his low back and a 5% pension for his left knee. The worker claimed that his 20% pension rating did not adequately reflect the non-organic components of his injury.

The worker had mixed pain (involving both chronic pain and pain from organic sources). There were identifiable organic problems with the worker's low back and left knee. But he also had non-organic symptoms reflected by complaints of right leg pain, shoulder pain, anxiety, insomnia, psycho-sexual inadequacies and tension headaches. The Panel concluded that the worker's pain was best characterized as predominantly organic, since there was a substantial organic component and since the worker's disability related primarily to physical limitations (rather than social or emotional problems). Therefore, the worker's pension rating should be determined under the organic disability Rating Schedule, but with recognition of his whole pain disability.

The Panel had to determine whether the Board had rated the worker's overall disability from pain (rather than simply the portion of the disability resulting from pain from organic sources). Even if the Board had rated overall disability, the Panel had to consider whether the Board had discounted the pension ratings for a non-organic component of pain.

The 15% pension for the low back and the 5% pension for the left knee were within the range to be expected for such conditions under the Rating Schedule. Though Board doctors were aware that the worker's symptoms were out of proportion with the organic findings, their evaluations reflected the knee and low back conditions as a whole, without discounting for non-organic pain. These ratings should remain unchanged.

However, some aspects of the worker's disability had clearly not been included in the Board's ratings. The worker was entitled to an additional 10% pension for the functional loss in his right leg and a 5% mid-back pension for the functional loss resulting from the pain between his shoulders. As symptoms of these conditions were reported immediately after the work accident and, as they were reported in a consistent manner, these pensions should be paid with full arrears, despite gaps in the reporting.

The worker's complaints of neck and right arm pain had never been fully and finally considered by the Board, they were not considered by the Panel in determining the worker's pension rating.

The worker's pension was increased from 20% to 35%. [12 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to; Decision No. 519/89 (1990), 13 W.C.A.T.R. 208 reld to; Decision No. 638/89I (1989), 12 W.C.A.T.R. 221 apld; Decision Nos. 780/90I reld to, 28/91 reld to
Board Directives and Guidelines: Report on the Changes to the Chronic Pain Disorder Policy, Board Minute 10, October 5, 1990, p. 5398

DECISION NO. 282/91 (11/07/91) McCombie Klym Meslin

Consequences of injury.

The worker suffered a low back injury in 1983. The worker appealed a decision of the Hearings Officer denying entitlement for a neck condition.

The worker was at HRC in February 1984, where he viewed a film on back care which recommended moving car seats closer to the steering wheel. The worker moved the car seat in his car, then felt a crack in his neck as he entered the car.

The Panel found that this incident was an accident in the sense that it was an unexpected injury. However, the worker had serious underlying degenerative disc disease which could have become symptomatic at any time. Neither moving the car seat nor entering the car made a significant contribution to the neck condition. The appeal was dismissed. [6 pages]

WCAT Decisions Considered: Decision No. 111 (1986), 3 W.C.A.T.R. 47 reld to; Decision No. 82/90I reld to

DECISION NO. 370/91 (11/07/91) McCombie Shartal Meslin (dissenting)

Commutation (interest of worker) - Board Directives and Guidelines (commutation) (rehabilitative measure) - Discretion, Board (commutation) - Merits and justice.

The worker appealed a decision of the Hearings Officer denying commutation of his pension. He wanted the commutation to invest in a money market fund until he has enough capital to set up a self-directed RRSP. He could then get a mortgage from his own RRSP and benefit from several tax advantages. The worker agreed that the request fell well outside Board guidelines. He submitted that he can manage his finances well on his own and that, the proposal was in his best interest. The worker was fully rehabilitated and was financially stable and secure. He has a surplus of \$2,400 per month.

Board policy can only be overturned if it interprets the Act in a manner which cannot be reasonably supported. The policy on commutation requires a rehabilitative purpose. Although the Act does not require a rehabilitative purpose, the policy was reasonable to insure, in general, that a worker's ongoing financial status does not deteriorate.

The majority of the Panel found that the interest of the worker warranted the commutation. There are circumstances in which a mechanistic application of the policy is unjust. The concerns that would arise on a commutation request were not present in this case. This worker will not become a burden on family, friends or the community. He has a solid work history and shrewd business acumen. The appeal was allowed.

The Employer Member, dissenting, found that the best interests of the worker could not be considered in isolation. The philosophy and intent of the law, policy and guidelines is to guarantee a reliable source of income and to grant commutations in exceptional cases where the rehabilitative best interests or pressing need of the worker is established. [14 pages]

Ss: 26(1), 26(4)

WCAT Decisions Considered: Decision No. 16 (1986), 1 W.C.A.T.R. 62 reld to; Decision No. 569/88 (1988), 9 W.C.A.T.R. 342 apld; Decision

No. 69/89 (1989), 12 W.C.A.T.R. 172 reld to; Decision No. 608/89 (1989), 12 W.C.A.T.R. 216 reld to; Decision No. 790/90 (1990), 16 W.C.A.T.R. 308 reld to; Decisions No. 578 reld to, 693 reld to, 694 reld to, 126/87 reld to, 979/87 reld to, 851/88 reld to, 716/90 consd, 844/90 apld Board Directives and Guidelines: Commutation of Pensions Policy, Board Minute 4, April 3, 1987, p. 5186; Guidelines for the Commutation of Pensions, Board Minute 3, March 20, 1989, p. 71

DECISION NO. 485/91I (11/07/91) Robeson Rao Chapman

Adjournment (addition of representative).

The hearing of a s. 77 appeal by the worker was adjourned to allow the worker to obtain a representative. The Panel gave the worker the benefit of the doubt that he was unable to retain counsel due to ill health. In order to have the matter dealt with expeditiously, the Panel rescheduled the hearing for a specific date. [3 pages]

DECISION NO. 166/91 (15/07/91) Chapnik Jackson Jago

Accident (occurrence).

The worker suffered a non-compensable fracture of his right shoulder in February 1989. He returned to work on June 1, 1989, but with restrictions on heavy work. The worker claimed that he injured his right shoulder on June 15, 1989 while lifting some steel rods at work with a co-worker.

The Panel found that the worker did not suffer an injury by accident at work on June 15, 1989. The alleged incident was not reported to the worker's foreman or the co-worker. It was unlikely that the co-worker would not have been made aware of the condition if the worker had experienced the sharp pain that he claimed. The worker's continuing pain was the result of the non-compensable accident. [6 pages]

DECISION NO. 247/91 (15/07/91) Bigras Fuhrman Clarke

Temporary partial disability (wage loss benefits).

The worker suffered a shoulder injury in September 1985. She returned to work in February 1986 but reduced her working hours after she began to complain of difficulties with her work. The worker appealed a decision of the Hearings Officer denying wage loss benefits from March 1986 to April 1986. On the evidence, the worker could not cope with full-time work due to her shoulder disability. The appeal was allowed. [6 pages]

DECISION NO. 298/91 (15/07/91) Robeson Robillard Nipshagen

Delay (onset of symptoms).

The worker suffered a low back injury in January 1985. The worker appealed a decision of the Hearings Officer denying entitlement for a neck injury which the worker claimed he also suffered in the compensable accident. It appeared that the Board denied entitlement on the incorrect information that the worker first reported neck symptoms one year after the accident. In fact, the worker reported neck symptoms within two weeks of the accident. The appeal was allowed. [8 pages]

DECISION NO. 395/91 (15/07/91) Robeson Robillard Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a deletion of material which was not relevant. [4 pages]

DECISION NO. 474/91I (15/07/91) Strachan Felice Jago

Adjournment (additional issues).

The hearing was adjourned to allow Tribunal Counsel to prepare submissions on complex preliminary issues raised by the employer contrary to the three week rule.

The issue on this appeal was whether owner/brokers retained by the employer were workers under the Act. The adjourned hearing was not to be reconvened until the Board had completed public hearings and issued an amended policy on independent operators. The policy was due to be published six months after the date of the adjourned hearing. [3 pages]

DECISION NO. 696/90 (16/07/91) Moore Higson Nipshagen

Significant contribution (of employment to disability) - Disablement (repetitive work) - Tear (rotator cuff).

The worker appealed a decision of the Hearings Officer denying entitlement for a rotator cuff condition which the worker claimed was a disablement from the nature of his work as a heavy equipment operator.

An ergonomics study found that the movements required to operate the equipment could be fatiguing and that there was some static loading of the shoulder but that the physical demands of the job were not likely to expose the worker to excessive risk of injury.

The Panel found that employment did not make a significant contribution to the development of the worker's condition. Medical literature suggested that the type of movements that may contribute to rotator cuff injury are strenuous activities that require continuous elevation of the arms above the shoulder. In this case, the job was, at most, fatiguing but this fatiguing effect was not sufficient to advance or accelerate the preexisting degenerative process. The job may have made the condition apparent but did not accelerate or add to the condition.

The appeal was dismissed. [9 pages]

WCAT Decisions Considered: Decision No. 280 (1987), 6 W.C.A.T.R. 27 reld to; Decision No. 652/87 (1988), 10 W.C.A.T.R. 75 consd; Decision No. 556 reld to

DECISION NO. 268/91 (16/07/91) Robeson Ferrari Nipshagen

Delay (reporting injury).

The worker suffered a knee injury in an accident in July 1985. The worker appealed a decision of the Hearings Officer denying entitlement for a back condition which the worker claimed he also suffered in the accident.

Although the worker did not report a back injury on the day of the accident, there was, at most, a three day delay in reporting. The Panel found that the worker suffered a back injury in the accident. The appeal was allowed. The Panel directed the Board to consider SIEF relief for the employer. [8 pages]

DECISION NO. 302/91 (16/07/91) Stewart Shartal Nipshagen

Suitable employment.

The worker suffered a back injury in October 1988. The worker returned to modified work in July 1989 but stopped working due to increased back pain. The employer appealed a decision of the Hearings Officer granting ongoing entitlement subsequent to June 1989.

Although the work offered by the employer was very light, there was some bending involved. If that aspect of the job could have been done by someone else, it was not explained to the worker.

The job was not suitable. Her back condition worsened and she was totally disabled the next day. The appeal was dismissed. [6 pages]

DECISION NO. 500/91 (16/07/91) Bigras Shartal Apsey

Access to worker file, s. 77 (deletion of material).

Access to the worker's file was granted to the employer, except for references to one particular event which occurred as a result of the worker's psychiatric disposition. Although remotely connected to the case, the event was not of a probative value which outweighed the embarrassment and grief which its disclosure would cause to the worker. [3 pages]

DECISION NO. 501/91 (16/07/91) Bigras Shartal Apsey

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 502/91 (16/07/91) Bigras Shartal Apsey

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 518/91I (16/07/91) Kenny Jackson Barbeau

Adjournment (referral to Board).

This appeal had previously been withdrawn to allow the worker to pursue entitlement for a later period at the Board. There was no explanation of reasons, but the Board referred the matter back to the Tribunal without making a final decision on the later period.

In the circumstances, the Panel decided that it was prepared to proceed on the issue of entitlement in the earlier period. However, the parties advised that they wanted a final decision from the Board on the later period. The hearing was adjourned. The matter was referred back to the Board for a final decision. [5 pages]

WCAT Decisions Considered: Pension Assessment Appeals Leading Case Interim Report (1986), 7 W.C.A.T.R. 365 reld to; Decisions No. 669/87L reld to, 258/88 reld to, 376/91 reld to

DECISION NO. 125/89R (17/07/91) Faubert Fox Kowalishin

Reconsideration - Procedure (absent parties).

The worker applied for reconsideration of Decision No. 125/89 in which access to the worker's file was granted to the employer.

The worker's representative was granted an adjournment of the hearing of the reconsideration due to illness of the worker and a witness. At the reconvened hearing, neither the worker nor his representative was present. There was some correspondence asking for another adjournment and indicating that the worker had a new representative who could not attend on the day of the hearing and that the worker had back problems. The Panel refused to adjourn the hearing. The Panel originally requested the hearing to permit the employer to respond to documentary material submitted by the worker. Further, there was no evidence to establish that the worker's back problems prevented him from attending.

The worker submitted that Decision No. 125/89 should be reconsidered because the employer might misuse the information in the worker's file. There was some indication that the employer might have used some material from the file for a grievance arbitration.

The Panel was unaware of any Tribunal decisions in which an employer had been denied access for prior misuse of medical information. Further, the Panel was unaware of any decisions on the issue of whether use of documents in other legal proceedings between the worker and the employer constituted disclosure within the meaning of s. 77(7). The worker and his representative did not object to use of the information at the arbitration hearing.

The evidence did not establish that the employer had misused the information. The application to reconsider was denied. [10 pages]

WCAT Decisions Considered: Decision No. 95 (1986), 2 W.C.A.T.R. 61 reld to; Decisions No. 72R reld to, 72R2 reld to, 826/88 reld to, 125/89 reld to

DECISION NO. 902/89 (17/07/91) Bigras Heard Jago

Rehabilitation, medical (cooperation) - Obesity.

A nurses' aide suffered an upper back injury in January 1986. The worker appealed a decision of the Hearings Officer denying benefits subsequent to March 1987, when she was discharged from HRC to regular work.

The Hearings Officer found that the worker's symptoms were mostly subjective and that a large part of her problem was her obesity and lack of physical fitness.

The Panel found that the worker continued to be temporarily partially disabled from March 1987 to January 1988. The worker's obesity and her refusal to diet were not grounds to deny entitlement. However, the worker's failure to diet constituted a failure to cooperate with rehabilitation. Reduction of her

obesity was a strict medical requirement in this case and was recommended by Board doctors and all treating physicians. The worker was not interested in dieting. Her failure to comply with doctors' requests to diet was a failure to cooperate with a medical programme.

The appeal was allowed. The case was referred to the Board to determine the level of benefits. [15 pages]

Ss: 40(2)(b)

WCAT Decisions Considered: Final Decision No. 2 (1987), 4 W.C.A.T.R. 1 consd; Decision No. 59 (1987), 5 W.C.A.T.R. 17 reld to; Decision No. 121 (1986), 3 W.C.A.T.R. 81 consd; Decision No. 672/87 (1987), 5 W.C.A.T.R. 194 reld to; Decisions No. 254 consd, 244/87 consd, 568/87 reld to, 609/87 reld to, 616/87 reld to, 1005/87 consd

DECISION NO. 644/90 (17/07/91) Hartman Ferrari (dissenting) Barbeau

Continuing entitlement - Pensions (arrears) - Evidence (videotape).

The worker suffered a left elbow injury in November 1976 while working as an assembler and welder of auto parts. In February 1988, he was awarded a 5% pension retroactive to July 1986. The worker appealed a decision of the Hearings Officer denying temporary benefits from September 1978 to September 1979 and denying arrears on the pension to the date of the accident.

In a preliminary matter, the Panel admitted a videotape of the worker working on his farm. The Panel had reservations about the use of video surveillance. However, the Panel admitted it as evidence, particularly since the worker did not object.

On the evidence, the Panel found that the lay-off in September 1978 was due to the worker's diminished interest in working both at his farm and at the factory. The worker was not entitled to temporary benefits during this time.

The Board granted pension arrears to July 1986, three months prior to the examination which it accepted as establishing a residual disability. The majority of the Panel found that the worker was not entitled to arrears prior to that date.

The appeal was dismissed.

The Worker Member, dissenting, found that the elbow condition existed and was permanent from the time of the accident and would have granted arrears to the date of the accident. [16 pages]

WCAT Decisions Considered: Decision No. 688/87 (1987), 6 W.C.A.T.R. 198 consd

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-01; Operational Policy Manual, Document no. 05-03-07

DECISION NO. 57/91 (17/07/91) McCombie Drennan Jago

Kreller v. Tectum Ltd.

Section 15 application - In the course of employment (proceeding to and from work) (employer's vehicle).

The plaintiffs in a civil case applied to determine whether their right of action was taken away. The plaintiffs were passengers in a vehicle that was involved in a motor vehicle accident with another vehicle driven by the defendant.

The defendant was driving his employer's vehicle from his home to work at the time of the accident. There were very few restrictions on the defendant's use of the van. The employer paid operating expenses but did not otherwise normally pay for travel expenses. The employer was not required to provide transportation and the defendant was not obliged to use the van.

The fact that the van was supplied by the employer was not enough to exempt the defendant from the general rule that injuries occurring while proceeding to and from work are not compensable. The defendant was not in the course of employment at the time of the accident. The plaintiffs' right of action was not taken away. [9 pages]

WCAT Decisions Considered: 217/88 consd; 471/90 reld to; 59/91 reld to
Cases Considered: Decision No. 2 (1973), 1 B.C.W.C.R. 7 consd

DECISION NO. 781 (18/07/91) Bigras Beattie Preston

Stress - Hypertension - Hemorrhage (retinal).

The worker appealed a decision of the Appeal Board denying entitlement for a retinal hemorrhage. The worker was a jewellery polisher. At first, it was thought that the condition was related to eye strain. However, doctors now agreed that the condition was caused by hypertension. The worker claimed that the hypertension was caused by the stress of his job.

The Panel accepted medical evidence that stress can cause hypertension. However, the Panel found that the worker was not experiencing stress at work as a jewellery polisher. Stress which causes hypertension is pressure which causes an emotional or psychological reaction. There was no evidence of such a psychological reaction in this case. Supportive medical reports were based on the worker's statements that he had considerable stress on the job.

The appeal was dismissed. [13 pages]

WCAT Decisions Considered: Decision No. 918 (1988), 9 W.C.A.T.R. 48 reld to; Decision No. 1018/87 (1989), 10 W.C.A.T.R. 82 reld to; Decision No. 145/89 (1990), 14 W.C.A.T.R. 74 reld to; Decision No. 980/89 (1990), 13 W.C.A.T.R. 304 reld to; Decision No. 952/89 reld to

DECISION NO. 368/89R2 (18/07/91) Onen Lebert Apsey

Reconsideration.

The worker's request to reconsider Decision No. 368/89 was denied. In Decision No. 368/89, the hearing panel denied benefits for degenerative disc disease, finding that the condition was not related to accidents in 1947 and 1961. The hearing panel considered the appropriate evidence and arrived at a reasonable conclusion. [6 pages]

WCAT Decisions Considered: 368/89L reld to, 368/89 reld to

DECISION NO. 118/91 (19/07/91) Bigras Beattie Barbeau

Disablement (nature of work).

The worker appealed a decision of the Hearings Officer denying entitlement for fallen arches. The evidence did not support a relationship between the worker's condition and employment. Although the worker was treated by the employer for the condition before his retirement, there was no evidence that the condition was related to work. The appeal was dismissed. [4 pages]

DECISION NO. 991/88 (22/07/91) Kenny B. Cook Nipshagen
Invesec Associates Ltd. v. Olea

Section 15 application - Schedule 1 employer (for profit or gain) - Schedule 1 employer (business or trade) - Words and phrases (industry, s. 1(1)(o)) - Class of employer (operation of apartment building) - Class of employer (condominium corporation).

The defendant in a civil case applied to determine whether the plaintiff's right of action was taken away. The plaintiff was employed by a condominium corporation. The corporation managed three highrise residential buildings, including some commercial premises. The issue was whether the condominium corporation was a Schedule 1 employer and, if so, whether it was excluded from Part I of the Act by s. 4(a) of Reg. 951.

Under the Condominium Act, the condominium corporation has a duty to control, manage and administer the common elements of the corporation. The Board used to consider condominium corporations to be automatically covered by the Act as being included in Class 25 item 10 (operation of an apartment building). However, in 1980 the Board decided that condominium corporations were not compulsorily covered since they were not operated as a business or trade or for profit or gain and that, therefore, they were excluded from Part I by s. 4(a) of Reg. 951.

The definition of industry in s. 1(1)(o) of the Act includes an establishment, undertaking, business or service. The definition does not include a profit requirement. The Panel concluded that the condominium corporation was an industry under the Act, even if it was not operated for profit.

Considering dictionary definitions for "apartment" and "condominium", the Panel found that "apartment building" was broad enough to encompass condominium apartments and that the operation of condominium apartments came with Class 25 item 10.

In the Panel's view, s. 4 of Reg. 951 was intended to exclude work done for private homes or organizations whose operations were not sufficiently regular or business-like to have the administrative apparatus or management knowledge to file with the Board and pay assessments whenever employing workers. The words "business" and "profit or gain" in s. 4 should be interpreted more broadly than the Board suggests. Business should encompass the habitual and regular work or occupation of an employer, even if it is not intended to produce a monetary profit which can be distributed to shareholders. Profit or gain should include an operation intended to obtain some advantage (probably pecuniary) for the employer or shareholders.

The Panel concluded that the condominium corporation operated as a business. It was created to manage the condominium property, valued at about \$75 million. It employed about 20 employees and hired a full time property management company. The corporation also operated for profit or gain. It operated for benefit of the unit holders. If well managed, the unit holders gained in their enjoyment of the common elements and in reduction of payments for common expenses.

Since the condominium corporation was a Schedule 1 employer at the time of the accident, the plaintiff's right of action was taken away. The plaintiff was entitled to workers' compensation benefits as provided under the Act. [26 pages]

WCAT Decisions Considered: 525 reld to, 991/881 reld to

Board Directives and Guidelines: Operational Policy Manual, Document no. 08-04-08

Regulations Considered: Reg. 951: s. 4(a); Sch. 1 class 25, item 10

Other Statutes Considered: Condominium Act, R.S.O. 1980 c. 84, s. 12; Interpretation Act, R.S.O. 1980 c. 219, s. 10

DECISION NO. 924/89R (22/07/91) Chapnik Lebert Seguin*Reconsideration.*

The worker's request to reconsider Decision No. 924/89 was denied. The evidence supported the conclusions reached in the original decision. [15 pages]

WCAT Decisions Considered: Decision No. 924/89 (1990), 14 W.C.A.T.R. 228 reld to; Decisions No. 72R reld to, 72R2 reld to
Practice Directions Considered: Practice Direction No. 8 (1987), 1 W.C.A.T.R. 233

DECISION NO. 526/91 (22/07/91) McCombie B. Cook Preston*Withdrawal (of appeal).*

The worker's appeal had been returned to the Board for consideration of entitlement for chronic pain pursuant to Practice Direction No. 9. However, due to a withdrawal by the worker of the chronic pain issue at the hearing before the Hearings Officer, the Hearings Officer confirmed organic disability and made no finding on chronic pain.

Due to changes in the Board policy on chronic pain, the worker now wanted to pursue the issue. In the circumstances, the appeal was withdrawn to allow the worker to pursue the issue of chronic pain at the Board. [6 pages]

Practice Directions Considered: Practice Direction No. 9 (1987), 1 W.C.A.T.R. 444

DECISION NO. 164/91 (23/07/91) McCombie Robillard Barbeau*Pneumonia - Aggravation (preexisting condition) (asthma).*

The worker appealed a decision of the Hearings Officer denying entitlement for pneumonia. The worker was a security guard. He had a preexisting asthmatic condition. For several days, the worker was working at a location where he was exposed to extremes of temperature and to dust from a resurfaced parking lot.

On the balance of probabilities, the Panel found that the worker's asthmatic condition was aggravated by his work environment and that, as a sequela to that aggravation, the worker developed a respiratory infection. The appeal was allowed. [6 pages]

DECISION NO. 431/91I (23/07/91) Newman Beattie Preston*Exposure (polypropylene) - Exposure (acetone) - Investigation by Tribunal.*

The worker appealed a decision of the Hearings Officer denying entitlement for contact dermatitis. The worker was exposed to polypropylene and acetone. The Panel needed additional medical information from a specialist in dermatology regarding the effects of these chemicals in the amounts and at the temperatures at which the worker was exposed. After receiving a report from a specialist, the parties would be invited to make further submissions. [7 pages]

DECISION NO. 422/91 (24/07/91) Robeson Shartal Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a number of references which were not relevant. [4 pages]

DECISION NO. 424/91 (24/07/91) Robeson Shartal Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a number of references which were not relevant. [4 pages]

DECISION NO. 425/91 (24/07/91) Robeson Shartal Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a number of references which were not relevant. [4 pages]

DECISION NO. 483/91 (24/07/91) McCombie Beattie Jago

Continuing entitlement.

The worker suffered a hand injury in 1985. The worker appealed a decision of the Hearings Officer denying further temporary benefits from June 1987 to September 1988. Considering discrepancies in the worker's evidence and lack of supportive medical evidence, the Panel found that the worker was not entitled to further benefits. The appeal was dismissed. [7 pages]

DECISION NO. 312/90R (25/07/91) Bigras Higson Seguin

Reconsideration (delay).

The worker's request to reconsider Decision No. 312/90 was denied. Delay of nine months was not unreasonable in the circumstances. The Tribunal had to make preliminary determinations regarding allowing the worker access to medical reports that had been withheld pursuant to s. 77(2). Since the worker's doctor had retired, the Panel had to arrange a s. 86h examination in order to make a decision. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decision No. 850/87R (1990), 14 W.C.A.T.R. 1 reld to; Decisions No. 72R reld to, 72R2 reld to, 312/90 reld to

DECISION NO. 372/91 (25/07/91) Newman Lebert Meslin

Re-employment (reinstatement) - Re-employment (termination) - Re-employment (determination re return to work) - Re-employment (notice from Board) (form of notice) - Re-employment (essential duties) - Jurisdiction, Tribunal (final decision of Board).

The employer appealed a decision of the Reinstatement Officer finding that the employer failed to fulfil its obligations under s. 54b, assessing a penalty against the employer and granting temporary benefits to the worker.

The worker injured his back on May 15, 1990. He returned to work on May 28, 1990, but stopped working after five days. He returned to work again on June 11, 1990. He worked at his pre-injury job but with difficulty and at a slower pace than before the accident. On June 15, 1990, the worker's employment was terminated as part of a substantial reorganization due to economic conditions, although the worker's productivity was a factor in the decision to terminate his employment. On June 19, 1990, the Board sent a notice of fitness to the employer advising that the worker was fit to perform his pre-injury work. The notice was received on June 26, 1990.

In a preliminary matter, the Panel found that it had jurisdiction to consider whether the worker was fit to perform the essential duties of his pre-injury job, even though this issue had not been considered by the Reinstatement Officer.

Based on the plain meaning of s. 54b, the Panel found that the obligation to re-employ arises only when the Board had made its determination regarding fitness and has notified the employer of the results of that determination. Specific and express notice is fundamental to the re-employment scheme. In this case, when the worker returned to work on May 28 and June 11, the statutory obligation to re-employ had not yet been created. The obligation did not arise until June 26, when the employer received the notice. Therefore, the termination on June 15 was not a violation of its re-employment obligations.

The employer submitted that the notice from the Board, that the worker was capable of performing the essential duties of his pre-injury work, was wrong and that the worker was only capable of suitable work.

The Panel found that an employer cannot postpone or avoid its obligation to reinstate a worker by challenging the notice of fitness. The employer must first comply with the notice and then appeal the determination using the usual appeal process.

An employer cannot defeat the re-employment obligation by terminating the worker's employment prior to receipt of the notice of fitness. When the notice was received on June 26, the employer was under an obligation to offer to reinstate the worker. However, due to the exceptional circumstances of this case, discussed below, the Panel found that the employer had not violated the obligation to re-employ.

Section 54b(2) requires that the Board make a determination of the worker's ability to perform the essential duties of pre-injury work or suitable work. To fulfil this obligation, the Board would have to determine: what the pre-injury job was; the essential duties of that job; the degree of any continuing disability; ability to perform the essential duties or suitable work. In this case, there was no indication that the Board made any inquiries to gather the information necessary to make these determinations. It appeared that the Board assumed, from the fact that the worker had returned to work on June 11, that he was in fact medically able to perform his job.

In the circumstances, the Panel found that the Board had no jurisdiction to give the notice of fitness and the notice must be regarded as a nullity. Therefore, the employer had no obligation to reinstate.

The appeal was allowed. However, the worker was entitled to full benefits for temporary partial disability. [16 pages]

Ss: 54b(2), 54b(3), 54b(4)

WCAT Decisions Considered: Decision No. 968/90 (1991), 17 W.C.A.T.R. 334 consd

Cases Considered: Ford Motor Co., 3 L.A. 779 consd; Rigby v. Connol (1880), 14 Ch. D. 482 consd

DECISION NO. 668/90 (26/07/91) Faubert Rao Apsey

Psychotraumatic disability - Continuing entitlement - Police.

The worker was a police officer who was injured in a motor vehicle accident during a high speed chase in June 1983. His car collided with another vehicle, resulting in the death of the driver of the other vehicle.

The worker was charged and convicted of criminal negligence causing death. The worker received temporary benefits until March 1984. The worker appealed a decision of the Hearings Officer denying further benefits.

The worker suffered guilt and depression following the accident. He returned to work in March 1984 to a special project with a different detachment. The project ended in March 1985 and he was told to return to his old detachment. However, the worker did not feel capable of returning to regular duty.

On the evidence, the worker had a continuing low back condition which had become permanent by the time he returned to work in 1984. He was entitled to be assessed for a pension for residual back disability.

It was clear that the worker suffered a psychological trauma as a result of the accident. This disability lasted for at least part of the time during which the worker was receiving temporary benefits. However, it was not established that the worker continued to suffer from a psychological disability related to the accident. The worker had no specific symptoms. His circumstances had stabilized. He now has high paying employment in Nova Scotia in a position which carries some responsibility. Although he is no longer willing to be a police officer, he is capable of carrying out responsible employment. The Panel concluded that the worker did not have a residual psychiatric disability.

The appeal was allowed in part. [12 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 03-03-03

DECISION NO. 444/91 (26/07/91) Bigras Robillard Seguin

Accident (occurrence).

The worker appealed a decision of the Appeals Adjudicator denying entitlement for a knee condition. Considering the credible evidence of the worker and the supportive evidence of his foreman, the Panel found that the worker twisted his knee as he stepped off a bulldozer. He suffered a torn meniscus and cruciate ligament, complicated by preexisting blastomycosis.

The appeal was allowed. The worker was entitled to benefits for the torn meniscus and cruciate ligament and for aggravation of blastomycosis. [13 pages]

DECISION NO. 536/91I (26/07/91) Kenny B. Cook Jago

Adjournment (additional evidence).

The worker was appealing a decision of the Hearings Officer denying benefits on the basis that the worker's employer was not a Schedule 1 employer. The hearing was adjourned to obtain results of a Board audit of the business and to arrange for witnesses to attend. [4 pages]

DECISION NO. 544/91 (26/07/91) McCombie Robillard Nipshagen

Withdrawal (of appeal).

The appeal was withdrawn as there was no issue in dispute. The worker was concerned about a possible disagreement with his rehabilitation counsellor but the only final decision of the Board was favourable to the worker. [4 pages]

DECISION NO. 458/90 (29/07/91) McIntosh-Janis McCombie Apsey

Continuity (of complaint) - Temporary disability (beyond pension level).

The worker suffered a neck and ankle injury in July 1981 for which he did not immediately lose any time. The worker appealed a decision of the Appeal Board denying temporary benefits from April 1982 to November 1982 and from April 1983 to November 1984.

There was continuity of complaint from the time of the accident until the worker laid off in April 1982. He underwent physiotherapy during this period and it was paid for by the Board. The worker was entitled to temporary total disability benefits during this period.

The worker was awarded a 2% pension in 1987 with full arrears. On the evidence, the worker was not disabled beyond his pension level during the period from April 1983 to November 1984. Accordingly, he was not entitled to temporary benefits during this period.

The appeal was allowed in part. [7 pages]

WCAT Decisions Considered: 458/90L reld to

DECISION NO. 521/90 (29/07/91) Sandomirsky Robillard Preston

Withdrawal (of appeal).

The appeal was withdrawn to allow the worker to pursue other issues at the Board. [3 pages]

WCAT Decisions Considered: 521/90I reld to

DECISION NO. 840/90 (29/07/91) Sandomirsky Lebert Jago

Continuity (of treatment).

The worker suffered a fractured pelvis in 1963. The worker appealed a decision of the Appeals Adjudicator denying entitlement for a left hernia, right groin pain and impotence subsequent to 1981. Considering the evidence of Board doctors and a s. 86h assessor, the Panel found that the current complaints were not related to the compensable accident. The appeal was dismissed. [4 pages]

DECISION NO. 294/91 (29/07/91) Chapnik Klym Barbeau

Disablement (strenuous work).

The worker appealed a decision of the Hearings Officer denying entitlement for a bilateral knee condition. The worker claimed that the condition was related to stair-climbing, crouching and bending. The worker submitted that she had a lack of staff help during the period in question. The Panel found that a full-time assistant was hired for the worker and that this assistant did much of the heavy work. On the evidence, the Panel found that the bilateral knee condition was not related to employment. The appeal was dismissed. [6 pages]

DECISION NO. 400/91 (29/07/91) Bigras Robillard Seguin

Suitable employment - Rehabilitation, vocational (eligibility).

The worker suffered a fractured collarbone in December 1987. He made a number of unsuccessful attempts to return to work and also refused modified work from the accident employer. The worker and employer both appealed a decision of the Hearings Officer granting 50% temporary partial disability benefits subsequent to May 1989 but denying vocational rehabilitation services.

On the evidence, the Panel found that the work offered by the employer was not suitable. The job which the worker refused was within the physical restrictions on his shoulder but was not suitable considering the worker's limited education and ability to communicate, read and write in English.

Communication problems between the worker, the employer and the Board led to difficulties in this case and to a deterioration of the relationship between the parties.

The Panel found that the worker had good reason to refuse the job offered by the employer. He did not fail to cooperate with rehabilitation. The worker was entitled to full benefits from May 1989 until he becomes entitled to a pension. Further, the Board was directed to re-open the worker's rehabilitation file and to aid the worker in getting back to work.

The worker's appeal was allowed. The employer's appeal was dismissed. [14 pages]

WCAT Decisions Considered: Final Decision No. 2 (1987), 4 W.C.A.T.R. 1 *reld to*; Decision No. 112 (1986), 3 W.C.A.T.R. 54 *reld to*; Decision No. 121 (1986), 3 W.C.A.T.R. 81 *reld to*; Decision No. 254 *reld to*
Board Directives and Guidelines: Operational Policy Manual, Documents no. 07-01-02, 07-04-05

DECISION NO. 475/91I (29/07/91) Robeson Jackson Ronson

Adjournment (referral to Board).

The hearing was adjourned to allow the worker to pursue further issues at the Board. [4 pages]

DECISION NO. 505/91 (29/07/91) McCombie Shartal Barbeau

Pensions (lump sum) (ten per cent pension) (advantage to worker) - Discretion, Board (commutation) (fettering).

The worker appealed a decision of the Hearings Officer denying commutation of her 8% pension for shoulder disability. The Hearings Officer denied the commutation under s. 45(4) of the pre-1989 Act since the worker's condition might deteriorate.

Future deterioration should be a consideration in determining whether payment of a lump sum would not be to the worker's advantage. However, it appeared to the Panel that the Board policy was fettering the Board's discretion. A Board doctor found that the commutation was not in order since the injury was to a major joint and that, therefore, there was a likelihood of deterioration. There was no consideration of the individual merits, of differences between various major joints, of how quickly deterioration might take place, of the worker's age or of why a likelihood of deterioration should, in and of itself, mean that a commutation would not be to the worker's advantage.

Even applying the Board guidelines, the Panel was not convinced that this worker's condition would deteriorate in the foreseeable future. The appeal was allowed. [8 pages]

WCAT Decisions Considered: Decision No. 16 (1986), 1 W.C.A.T.R. 62 *reld to*; Decision No. 791/87 (1987), 6 W.C.A.T.R. 253 *reld to*; Decisions No. 749/89 *consd*, 233/90 *consd*

Board Directives and Guidelines: Operational Policy Manual, Document no. 05-03-08

DECISION NO. 525/91 (29/07/91) McIntosh-Janis Lebert Preston

Administrative Fund (transfer of costs) - Consequences of injury (iatrogenic illness) (treatment).

The employer appealed a decision denying its request to have a portion of the cost of the worker's claim transferred to the Administrative Fund.

The worker suffered a compensable injury to his forearm. As a result, in November 1984, he had surgery to his forearm that involved a nerve graft from his right leg. The worker began complaining of numbness and pain in the right leg in January 1985, but he returned to work in March 1985. By September 1987 the leg problems forced him to stop working. Surgery was performed in March 1988 to remove a neuroma from the donor site. However, the worker's problems continued until further surgery in July 1989, when the attachment of the sural nerve was relocated to a more appropriate site.

Board policy provided for a transfer of costs where the costs resulted from a disability arising out of treatment. The Panel found that the worker's additional and unexpected problems with his right leg involved a disability arising out of treatment of his initial compensable forearm injury. The employer was thus entitled to relief from increased costs related to this added disability. The costs of the worker's medical aid and lost time benefits from September 1987 to August 1989 were to be transferred to the Administrative Fund.

In March 1986, the worker was awarded a 4% pension for the ulnar nerve condition in his wrist and a 2% pension for hypoesthesia of the sural nerve distribution in the right leg. The Panel found that no portion of the costs of the pension award should be transferred. The 2% award reflected the minimal amount of disability that is normally associated with a sural nerve graft. It did not reflect the extended disability suffered by the worker from 1987 to 1989 which was responsible for greatly increasing the cost of the claim. [7 pages]

Ss: 108(2)

WCAT Decisions Considered: Decision No. 930/87 (1988), 9 W.C.A.T.R. 175 reld to; Decision No. 431/89 (1989), 11 W.C.A.T.R. 355 reld to; Decision Nos. 191 reld to, 169/90 reld to

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-02-34, 33-27-01

DECISION NO. 615/90 (30/07/91) McIntosh-Janis Drennan Meslin

Exposure (welding fumes) - Disability (definition) - Permanent disability (inability to return to work).

A welder stopped working in July 1987 due to swelling of his soft palate and uvula caused by exposure to welding fumes. He received benefits for acute throat irritation from July 27 to August 4, 1987. The worker appealed denial of continuing benefits until the worker returned to other work with the employer in 1989 that did not involve exposure to welding fumes. The Board denied benefits since it found that there was no disability after the acute symptoms subsided.

The Panel was satisfied that, although the acute symptoms had resolved by August 4, the worker could not return to welding work without risking recurrence of his disability. The inability to return to work was a disability within the meaning of the Act.

The worker was not entitled to further temporary benefits, once the acute period of disability resolved by August 4. There was no further temporary functional limitation to prevent him from returning to work. However, his disability was permanent in the sense that he must avoid any future exposure to welding fumes. He was entitled to a pension and would also be entitled to temporary benefits for any acute periods of disability related to exposure.

The appeal was allowed. The matter was referred to the Board to determine the amount of the pension.
[11 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to; Decision No. 885/88 (1989), 11 W.C.A.T.R. 163 distd; Decision No. 1045/89 (1990), 14 W.C.A.T.R. 240 distd; Decision No. 59/90 (1990), 15 W.C.A.T.R. 132 apld; Decision No. 331/91 apld
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-13-01; Claims Services Division Manual, s. 122(1), p. 257, Directive 12

Other Statutes Considered: Occupational Health and Safety Act, R.S.O. 1980 c. 321

DECISION NO. 182/91I (31/07/91) McIntosh-Janis Lebert Barbeau

Investigation by Tribunal - Cancer (larynx) - Cancer (esophagus) - Exposure (asbestos) - Smoking - Alcohol - Industrial Disease Standards Panel (asbestos).

The worker's widow appealed a decision of the Hearings officer denying the worker entitlement for cancer of the larynx. The worker had intense exposure to asbestos when he worked as an asbestos bagger for eight months in 1958-59. He also had lower exposure to asbestos while working for a second employer from 1959 to 1986. The worker was diagnosed as suffering from cancer of the larynx in October 1986 and underwent successful surgery. In January 1990, he was diagnosed as having inoperable cancer of the esophagus. He died in June 1990.

The Panel needed additional medical information regarding a number of matters, including: brief but high exposure to asbestos; increased risk of developing a second primary cancer; synergistic risk of developing laryngeal or esophageal cancer when two types of exposure (short, intense exposure and subsequent minimal exposure over time) have occurred; synergistic effects of alcohol and smoking on development of cancer.

The Panel may also have to consider the jurisdictional question of entitlement for esophageal cancer when the Board had not yet considered that issue. [14 pages]

WCAT Decisions Considered: 211 reld to

Board Directives and Guidelines: Operational Policy Manual, Documents no. 04-04-13, 04-04-14

DECISION NO. 450/91 (31/07/91) McGrath Rao Apsey

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 232/90 (31/07/91) Bigras Higson Nipshagen

Fibromyalgia - Causation (medical evidence) (standard of proof) (fibromyalgia) - Tribunal counsel (role of) (bias) - Bias - Case Description - Issue setting - Credibility.

The worker twisted her back at work in August 1979 and suffered what was originally diagnosed as lumbosacral strain. Her benefits were terminated in October 1980. At that time, there was no discernible organic injury for which compensation could be granted. However, the worker continued to complain of diffuse pain, numbness and headaches.

Based on the worker's consistent reporting of her symptoms, her willingness to co-operate with medical programs and her attempts to return to work, the Panel rejected the evidence of the employer and of Board doctors that the worker was manipulative or exaggerating. The Panel accepted as genuine the worker's reported symptoms, as did the majority of doctors.

The Panel found that the worker had fibromyalgia. The worker had pain of unknown etiology in the upper back and neck which was clearly detectable at identifiable trigger points located between her shoulder blades and in the muscular structure of her upper body. She had continually complained of headaches since shortly after the accident. Other signs of fibrositis included the diagnosis of an anxiety state, increased pain in cold and damp weather, tingling or numbness in the worker's limbs and evidence of sleep disturbance.

The Panel's finding of fibromyalgia was made without the benefit of the diagnosis by a rheumatologist. Since they are specialists who are considered more adept at detecting fibromyalgia, the Board normally requires their opinion and some Tribunal panels have sent workers for an examination by a rheumatologist to confirm the diagnosis. In this case, the Panel chose not to rely on this time-consuming process. Two orthopedic specialists, also considered knowledgeable with respect to fibrositis, had made the diagnosis. The Panel's review of the history of the worker's symptoms supported the finding of the presence of fibromyalgia. A rheumatologist's opinion at this late date would not give the Panel a better understanding of the onset and early progression of the worker's symptoms, 10 years earlier.

The Panel found that the fibromyalgia condition was work-related. Though the worker had a pre-existing low back condition, it could not be related to the worker's fibromyalgia disability which was characterized by neck and upper back pain. The worker's predisposition to an anxiety state and her apprehensions involving her work duties, even if not based on reality, were not good reason to deny compensation, absent findings of malingering or voluntary exaggeration of symptoms. The worker's complaints of fibromyalgia symptoms appeared gradually, starting a few months after the accident. Increased medical treatment also began at that time and continued throughout the period in issue.

The worker was entitled to full temporary benefits from October 1980 to February 1981, when her doctor concluded that she was permanently disabled. Assessment of the level of permanent disability was left to the Board.

The employer argued that the inclusion, in the Case Description, by the Tribunal Counsel Office, of medical literature and case law relating to fibrositis raised an apprehension of bias. The employer argued that the large volume of this material, combined with the omission of other possible factors, created the impression that the worker did in fact have fibrositis.

The Panel rejected that argument. Prior to the final appeal at the Board level, in 1981, there was only one mention of fibrositis. Two diagnoses of fibrositis were made subsequently that were never considered by the Board. (Fibrositis was not commonly recognized until the mid-1980's. None the less, fibrositis-type symptoms were noted by the worker's doctors all along.) It was thus understandable that the Board did not identify a fibromyalgia issue and that there was no relevant information on file. As the diagnosis was now on file, it was necessary that as much information as possible pertaining to the medical and adjudicative aspects of this condition be available. The Tribunal has the mandate to hear new evidence, including evidence obtained on its own initiative. The issue never changed. It was always the worker's entitlement to benefits for the period subsequent to October 1980.

Tribunal counsel neither suggested what conclusions should be drawn from the material, nor pointed to any piece of information which should be considered more relevant than any other. The information was made available to both parties and the employer had the opportunity to raise any other theories that it thought better explained the worker's condition. There was no apprehension of bias. [28 pages]

WCAT Decisions Considered: Decision No. 18 (1987), 4 W.C.A.T.R. 21 consd; Interim Decision No. 24 (1986), 1 W.C.A.T.R. 93 reld to; Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to; Decision No. 669/87F (1989), 11 W.C.A.T.R. 54 consd
Board Directives and Guidelines: Fibromyalgia Syndrome Policy, Board Minute 3, October 7, 1988, p. 5256
Practice Directions Considered: Practice Direction No. 9 (1987), 7 W.C.A.T.R. 444

DECISION NO. 177/91 (01/08/91) Newman Shartal (concurring in result) Nipshagen Rigby v. MacIntyre

Section 15 application (workers of both employers) - Employer - Independent operator - Worker (test).

The plaintiff and defendant were involved in a motor vehicle accident. The plaintiff applied to determine whether his civil right of action was taken away. The issue was whether the defendant was an employer and, if so, whether there was a right of action.

The defendant owned and operated a scrap metal business. The defendant and a number of drivers picked up scrap metal and delivered it to scrap yards. The defendant paid drivers a flat rate for scrap. If the drivers picked up scrap on their own initiative, the defendant would pay an additional percentage. The defendant owned the trucks used by the drivers. They did not work regular shifts and chose their own hours.

Applying the organization test, the majority of the Panel found that the defendant and the drivers did not have an employer/worker relationship, considering the informality of the arrangements, the minimal control exerted by the defendant and the entrepreneurial potential which the drivers enjoyed. The majority found that the defendant was a self-employed businessman who engaged other self-employed drivers to perform services.

The defendant was not an employer. Since he did not elect personal coverage, he was not deemed to be a worker. Therefore, the plaintiff's right of action was not taken away.

The Worker Member agreed with the conclusion of the majority but for different reasons. After an extensive review of the tests for determining worker/independent operator status, the Worker Member found

that the defendant was an employer and that the drivers were workers of the defendant. The drivers had no equity in the business, they took no risk of loss, they had no other clients, they were dependent on the defendant and there was a good deal of control of their activities by the defendant although in a somewhat informal manner.

Section 8(9) takes away the right of action where the workers of both employers were in the course of employment at the time of the happening of the injury. A history of s. 8(9) indicated that, since amendments to the Act in 1968, there has been no intent to indemnify employers where they themselves were involved in accidents with workers of different employers. A review of the history of s. 11 showed that employers have to opt in specifically if they want coverage.

The Worker Member concluded that the limitation on the right to sue applied only to cases arising out of the actions of an employer's workers and not to a case where the employer was personally involved in the accident. This was also the plain meaning of s. 8(9). Therefore, the right of action against an employer for the employer's own personal negligence where the employer did not have personal coverage (as in this case) was not taken away. [34 pages]

Ss: 8(9)

WCAT Decisions Considered: Decision No. 154 (1986), 1 W.C.A.T.R. 208 consd; Decision No. 303 (1986), 3 W.C.A.T.R. 127 reld to; Decision No. 576/87 (1987), 6 W.C.A.T.R. 163 reld to; Decision No. 226/89 (1989), 11 W.C.A.T.R. 307 consd; Decision No. 921/89 (1990), 14 W.C.A.T.R. 207 consd; Decisions No. 525 consd, 76/87 reld to, 422/87 consd, 872/87 reld to, 1056/87 reld to, 158/88 reld to, 268/88 reld to, 552/88 consd, 940/88 reld to, 590/89 reld to, 158/90 consd, 164/90 reld to, 759/90 reld to, 868/90 reld to

Board Directives and Guidelines: Determination of Worker/Independent Operator Status: Impact of the Organizational Test, Board Minute 8, December 6, 1990, p. 5410

DECISION NO. 445/91 (01/08/91) Bigras Robillard Seguin

Pensions (assessment) (back) - Temporary disability (beyond pension level) - Rehabilitation, vocational (academic training) - Rehabilitation, vocational (cooperation).

The worker suffered a low back injury in 1974. In October 1976, he was awarded a 10% pension, increased in 20% in 1981. In June 1982, he began educational upgrading courses sponsored by the Board but the Board withdrew sponsorship in June 1983 due to excessive absenteeism. In 1987, his pension was increased to 30% after a spinal fusion. The worker appealed a decision of the Appeals Adjudicator denying temporary benefits subsequent to June 1983 and denying an increase in the worker's pension at that time.

The 20% pension was fair and adequate for the worker's back condition during the time in question, considering medical reports indicating good extension, rotation and flexion capacity and leg raising in the 90 to 70 degree range. Further, the worker was not temporarily disabled beyond his pension level during the period in question.

The worker had to drive 60 km to attend classes. However, the medical evidence did not support the worker's claim that he could not attend his classes due to his back condition. The Panel found that he did not cooperate with rehabilitation and was not available for suitable employment. Therefore, he was not entitled to a pension supplement.

The appeal was dismissed. [24 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to

DECISION NO. 490/91I (01/08/91) Robeson Jackson Barbeau

Adjournment (witness availability).

The worker was appealing denial of ongoing entitlement. The appeal was adjourned at the employer's request due to the unavailability of two of its witnesses. The witnesses were critical to the employer's case and were unavailable because of an emergency that had arisen at the employer's plant. [4 pages]

DECISION NO. 546/91I (01/08/91) McCombie Jackson Apsey

Adjournment (Board policy).

The worker's widow was appealing denial of entitlement for lung cancer resulting from employment as a gold miner. The hearing was adjourned to await a revised Board policy on compensation for gold miners with lung cancer. This policy is expected shortly. The Panel requested that, if the new policy is adopted, the Board re-adjudicate the case on an expedited basis. [4 pages]

DECISION NO. 527/90 (02/08/91) Strachan Ferrari (dissenting) Nipshagen

Second accident - Recurrences (compensable injury) (strains and sprains).

The worker appealed a decision finding that the back problems which he experienced in February 1984 were the result of a new compensable accident, rather than a recurrence of a compensable injury sustained in March 1982.

The worker had a history of compensable and non-compensable neck, shoulder and back injuries from 1975 to 1981. In March 1982 he suffered neck, shoulder and back strain due to a work accident. The worker received benefits from March to October 1982. He worked for three days in October 1982. Benefits were resumed until February 1983. The worker did not return to work until February 1, 1984, at which time his new duties involved finishing, lifting and stacking heavy table tops. He suffered a gradual onset of pain which caused him to leave work on February 10, 1984. The Board allowed the claim on a disablement basis. The worker received temporary benefits until February 1985 and in January 1986 he was awarded a 15% pension.

The majority of the Panel found limited medical evidence linking the 1984 back problem to the March 1982 accident. Aside from a possible psychological condition which was not at issue in this appeal, the worker's back problems appeared to have resolved by the end of 1982. Medical reports relating to October 1982 did not refer to back problems. The work performed in February 1984 was onerous as it involved significant lifting and twisting. It resulted in a gradual onset of pain which disabled the worker. This was understandable considering that the worker had basically been inactive for the previous two years. This strenuous work resulted in a new disablement. There was no hard evidence to support one doctor's suspicion, in 1983, of a disc prolapse.

The Worker Member, dissenting, felt that the medical evidence supported a causal relationship between the March 1982 accident and the worker's condition subsequent to February 1984. There was continuity of complaint and treatment throughout the period. [15 pages]

DECISION NO. 409/91 (02/08/91) McCombie Shartal Barbeau

Pensions (stacking) - Pensions (assessment) (whole person concept) - Issue setting.

The worker appealed a decision of the Hearings Officer granting 50% temporary benefits for a two week period in 1988 and denying an increase in the worker's 15% pension for organic low back disability. The worker had also been awarded a 15% provisional pension for psychological disability, later increased to 20% and made permanent. In addition, there was evidence of chronic pain.

After allowing the worker the option of withdrawing the appeal in order to pursue entitlement at the Board, the Panel considered the level of the worker's pension on a whole person basis, taking into account all facets of his disability.

The worker was entitled to full temporary benefits during the two week period in issue since he was cooperating with rehabilitation.

Regarding the permanent disability, the Panel found that the worker's disability had a minor organic component and a major psychological/chronic pain component. The Board has a no stacking policy for chronic pain and organic disability. However, the policy also suggested that an organic award and a psychotraumatic award can be stacked.

The purpose of the no stacking policy was to prevent compensating for the same disability twice by giving it different names. However, if one injury results in two different disabilities, then the total of the disabilities must be compensated.

In this case, it was difficult to differentiate between the pain resulting from organic and non-organic sources. Therefore, the Panel considered all pain in the evaluation of the non-organic elements of the whole disability. Considering the organic aspects of the disability, excluding pain, the Panel felt that a 10% award was appropriate. The non-organic disability, including pain from organic sources, came within the mid-range of Category 3 of the Rating Schedule. The range of Category 3 was 30% to 50% with the middle of that range being 40%. By stacking these pensions, the Panel found that the worker was entitled to a 50% pension.

The appeal was allowed. [15 pages]

WCAT Decisions Considered: 901/87(2) consd

Board Directives and Guidelines: Operational Policy Manual, Documents no. 03-03-03, 03-03-06

DECISION NO. 24/89 (06/08/91) Carlan B. Cook Merritt

Rheumatoid arthritis - Exposure (methyl ethyl ketone) - Presumptions (section 3).

The worker appealed a decision of the Hearings Officer denying entitlement for rheumatoid arthritis. The worker related the condition to work he did during one shift when he applied a mixture of resin and hardener to fibreglass.

There was a temporal relationship between the exposure and the onset of symptoms. However, the presumption that the disability arose out of employment was rebutted. All medical opinions dismissed a causal relationship between exposure and the disability. There was no theory advanced which provided a possible connection between the work and the onset of the disability.

The appeal was dismissed. [9 pages]

WCAT Decisions Considered: Decision No. 470 (1990), 15 W.C.A.T.R. 1 reld to; Decision No. 42/89 (1989), 12 W.C.A.T.R. 85 reld to

DECISION NO. 535/90 (06/08/91) Moore Klym Apsey
472729 Ontario Ltd. v. Greene

Section 15 application.

In Decision No. 535/90I, the Panel found that the right of action of one plaintiff was not taken away. The other plaintiffs abandoned their application. The Panel confirmed its interim decision and dismissed the application of the other plaintiffs. [5 pages]

WCAT Decisions Considered: 535/90I reld to

DECISION NO. 51/91R (06/08/91) Sandomirksy Lebert Seguin

Reconsideration.

The worker's request to reconsider Decision No. 51/91 was denied. [3 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decisions No. 72R reld to, 72R2 reld to, 51/91 reld to

DECISION NO. 423/91 (07/08/91) Newman Lebert Meslin
Aakanson Trading Co. (Quebec) v. Santoli

Section 15 application - In the course of employment (proceeding to and from work) (employer's vehicle) - In the course of employment (on call).

The defendants in a civil action applied to determine whether the plaintiff's right of action was taken away. The issue was whether the defendant driver was in the course of employment at the time of a motor vehicle accident.

The defendant was a property manager for five residential buildings. He was driving home in the employer's van when the accident occurred. The defendant considered himself to be on call at all hours. The Panel found that the defendant was not in the course of employment at the time of the accident. Generally, a worker is not in the course of employment while proceeding to and from work. The worker was engaged in the purely personal activity of driving home.

The right of action was not taken away. [8 pages]

DECISION NO. 493/91 (07/08/91) Bigras Lebert Apsey

Pensions (arrears).

The worker suffered a left knee injury in 1969. In 1977, he was awarded a 4% pension. In 1978, the pension was increased to 8% with full arrears. In 1989, the pension was increased to 15% with arrears to a date in 1987 which was three months prior to the date a specialist determined that further surgery was required. The worker appealed a decision of the Hearings Officer denying further arrears of the pension.

Medical evidence did not support earlier deterioration of the worker's condition. The appeal was dismissed. [8 pages]

Board Directives and Guidelines: Operational Policy Manual, Documents no. 05-03-03, 05-03-07

DECISION NO. 403/91 (08/08/91) Faubert Shartal Jago

Pensions (assessment) (back).

The worker suffered a back injury in 1986 for which he was awarded a 20% pension. As a result of an appeal to the Hearings Officer, the pension was increased to 30%. The worker appealed the decision of the Hearings Officer, claiming that the 30% award did not adequately compensate for his disability.

The worker had pain in his back and leg and limitation of movement. The symptoms affected his ability to sit, stand or walk for long periods. The worker did have some lumbar spine movement. Compared to the Rating Schedule, the Panel found that the worker's condition was similar to the benchmark of 30% for a fully immobile lumbar spine. The appeal was dismissed. [7 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 apld

DECISION NO. 437/91 (08/08/91) Stewart Lebert Meslin

Access to worker file, s. 77 - Procedure (absent parties).

The worker was appealing a decision of the Board granting the employer access to the worker's file. The Panel proceeded with the hearing in the absence of the worker and his representative.

Access to the worker's file was granted to the employer, except for a number of references which were not relevant. [5 pages]

DECISION NO. 442/91 (08/08/91) Stewart Lebert Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 443/91 (08/08/91) Stewart Lebert Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 492/91 (08/08/91) Bigras Lebert Apsey

Commutation (business investment) - Pensions (lump sum) (ten per cent pension).

The worker appealed a decision of the Hearings Officer denying commutation of his 10% pension. The worker was a plumber who suffered a low back injury. He started his own plumbing business and wanted the commutation to repay a loan, purchase a new vehicle and purchase additional stock and equipment.

There did not appear to be any reason to deny a lump sum payment under s. 45(4) of the pre-1989 Act. However, even under s. 26, the worker was entitled to the commutation. The worker was unable to return to regular employment. There was medical evidence that the worker was in danger of developing a psychological disability and that the commutation could help remedy the situation. The worker met the requirements of the Board policy. The appeal was allowed. [6 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 05-03-08

DECISION NO. 543/91 (08/08/91) McIntosh-Janis Jackson Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, including a report marked sensitive by the Board. The Panel found nothing sensitive in the report which would cause any concern in granting access. [3 pages]

DECISION NO. 468/91 (09/08/91) Robeson Higson Apsey

Time limits (section 21) - Procedure (section 21).

The employer applied for an order requiring the worker to attend a medical examination. The employer wrote to the Board 18 days after the worker failed to attend the examination, advising that it wanted to apply for an order under s. 21 and requesting the Board to send the file to the Tribunal. The file arrived at the Tribunal nine months later.

The employer did not comply with the mandatory statutory requirement of applying within 14 days. In addition, the application was deficient since it was made to the Board and not to the Tribunal. An early Tribunal decision had accepted a letter to the Board as an effective application. However, the Tribunal had only been in existence for one month at the time that letter was written. Now that the Tribunal has been in existence for a number of years, it was reasonable to expect the employer to apply to the correct body.

The application was denied. [5 pages]

Ss: 21

WCAT Decisions Considered: Decision No. 626 (1987), 4 W.C.A.T.R. 253 apld; Decision No. 336 distd

DECISION NO. 640/90 (13/08/91) Hartman Rao Barbeau

Access to worker file, s. 77 (issue in dispute) - Access to worker file, s. 77 (procedure, Board).

The employer appealed a decision of the Access Administrator denying access to certain irrelevant medical reports in the worker's file. The issues in dispute raised by the employer were continuing entitlement and SIEF. However, the employer had not yet requested SIEF relief and there had been no Board decision regarding SIEF. The Panel found that there could be no issue in dispute until the Board makes a decision.

The documents to which the employer was not given access were not relevant to the issue of continuing entitlement. The appeal was dismissed.

The Panel recommended that the Board amend its forms to make clearer the reason why access was being denied, particularly whether the material was not relevant under s. 77(3) or contained harmful information under s. 77(2). In addition, the Panel recommended that the Board make clear whether a worker has a right to object to release of non-medical information. [7 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 01-04-11

DECISION NO. 53/91 (13/08/91) Faubert Felice Chapman

Summons - Three week rule (witnesses) - Jurisdiction, Tribunal (final decision of Board) - Issue setting - Temporary disability (beyond pension level).

The worker appealed a decision denying him entitlement to temporary total disability benefits after February 1990. The Hearings Officer found that the worker was not totally disabled from employment after that date. The Hearings Officer specifically made no finding with respect to the worker's entitlement to temporary partial disability benefits, as no claim had been made for such benefits.

The worker injured his low back in December 1987. He made various attempts at returning to modified employment with the accident employer, the latest in early February 1990, but they resulted in recurrences of the injury. The worker received temporary benefits for various periods and he was awarded a 10% pension in May 1989. The worker felt that none of the jobs offered to him by the worker were suitable, considering the medical restrictions placed upon him and the repeated recurrences. In February 1990 he began attending an electronics course which he completed in August 1990. The worker found employment in the electronics field at a lower rate of pay than he earned in his general labour employment with the accident employer.

The issue before the Hearings Officer could be properly characterized as entitlement to additional temporary disability benefits after February 1990. The question of entitlement to temporary partial disability benefits was thus in issue before the Hearings Officer. His failure to rule on an issue that was properly before him did not deprive the Tribunal of its jurisdiction to decide the question.

However, the issues before the Panel could not be expanded to include the worker's entitlement to vocational rehabilitation benefits or to a wage loss supplement. The issue presented throughout these proceedings related to the level of the worker's disability. The rehabilitation and wage loss supplement issues did not naturally flow from a consideration of the appropriate level of disability. The Panel was restricted to considering the level of the worker's disability and the appropriate level of benefits payable after February 20, 1990.

There was no doubt that the worker was no longer capable of carrying out heavy labour, but the medical evidence did not indicate that the worker was totally disabled after February 20, 1990. Nor was the worker temporarily partially disabled to a level beyond his pension rating. The medical evidence was that the

worker had recovered from his flareup of early February 1990 and that he did not require further treatment until August 1990. Meanwhile, he was enrolled in a full-time community college course that required extensive periods of sitting while driving to and from school, attending classes and studying. He was also engaged in a very active exercise program at the time. The worker's condition was stable after February 20, 1990.

The worker's appeal was denied.

A preliminary issue arose respecting the issuance of a summons by the Tribunal, at the request of the employer, to compel the attendance of two officials with the union local that represented the worker. The employer advised the Tribunal of its intent to call these witnesses and provided an outline of their evidence more than three weeks before the hearing. However, due to inadvertence, the employer failed to request the issuance of a summons until one week before the hearing. The Tribunal Counsel Office (TCO) issued the summons, the witnesses attended the hearing and the worker objected on the basis that the summons was issued contrary to Practice Direction No. 10 (PD 10).

The majority of the Panel refused to set aside the summons. The three-week time limit in PD 10 is not mandatory. PD 10 has other purposes besides insuring compliance with the three week rule. It allows for a review of all summons requests by TCO that eliminates the expense associated with frivolous requests and prevents the inconvenience to witnesses of needlessly being compelled to attend a hearing. In this case the worker was informed of the employer's intention to call the witnesses in compliance with the three week rule.

There was no prejudice to the worker in the preparation of his case. The short notice may have resulted in inconvenience to the witnesses, but they took no steps to set aside the summons on their own behalf. It was irrelevant that these witnesses would not have testified without the compulsion of a summons.

The Worker Member dissented with respect to the preliminary issue only. He noted that TCO made no attempt to contact the worker to inform him that the summons would be issued. The worker was informed by the witnesses that they would not testify unless they were forced to do so. Issuance of the summons contrary to the three week rule thus did not give the worker the proper time to prepare for cross-examination of the witnesses. [16 pages]

Practice Directions Considered: Practice Direction No. 10 (1989), 12 W.C.A.T.R. 290

DECISION NO. 74/91 (13/08/91) Hartman Lebert Barbeau

Disablement (nature of work) - Accident (occurrence).

The worker, a seasonal labourer with a paving company, was not entitled to benefits for a laminectomy that he underwent in January 1987. That surgery revealed the presence of a disc protrusion. The worker claimed that he began experiencing back pain shortly before his seasonal lay-off in December 1986.

The Panel found that no specific incident occurred at work in late 1986 to cause the disability. There was evidence of prior leg and back pain. The worker did not seek medical treatment until well over a month after the lay-off.

The worker's onset of acute pain did not occur until after the layoff. The diagnosis immediately leading to the surgery was lumbar disc protrusion with left foot drop and congenital spinal stenosis cauda equina syndrome. Considering the worker's prior back condition, the Panel found that there was no injuring process associated with the employment performed by the worker in the autumn of 1986 that significantly contributed to the 1987 surgery. [10 pages]

WCAT Decisions Considered: Decision Nos. 902 reld to, 933/90 apld

DECISION NO. 545/91I (13/08/91) McIntosh-Janis Jackson Preston

Access to worker file, P. D. 1.

Access to the Case Description was granted to the employer. [3 pages]

DECISION NO. 554/91 (13/08/91) McCombie Robillard Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 555/91 (13/08/91) McCombie Robillard Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 31/88R (14/08/91) McIntosh-Janis B. Cook Apsey

Reconsideration.

The worker's request to reconsider Decision No. 31/88 was denied. [6 pages]

WCAT Decisions Considered: 31/88 reld to

DECISION NO. 66/91R (14/08/91) Robeson Beattie Apsey

Reconsideration.

The worker's request to reconsider Decision No. 66/91 was denied. In Decision No. 66/91, the Panel ordered the worker to attend a medical examination. The worker submitted that he was 71 years old and no longer working and that, therefore, there was no longer a valid compensation goal. The Panel found that the employer could still pursue its compensation goals of initial entitlement, ongoing entitlement and SIEF. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decisions No. 72R reld to, 72R2 reld to, 66/91 reld to

DECISION NO. 558/91 (14/08/91) McIntosh-Janis Lebert Preston

Withdrawal (of application) - Procedure (section 21) (access to worker file).

The employer's application under s. 21 for a medical examination was withdrawn to allow the employer to seek access to the worker's file. [3 pages]

DECISION NO. 372/90 (15/08/91) Stewart B. Cook Jago

Continuing entitlement - Aggravation (preexisting condition) (disc, degeneration).

The worker suffered a low back injury in April 1985 when she fell off a chair. The worker appealed a decision of the Hearings Officer denying continuing benefits subsequent to November 1985. The worker had preexisting degenerative disc disease. On the evidence, the Panel found that the worker did not continue to be disabled by organic back disability resulting from the accident. The appeal was dismissed. [8 pages]

DECISION NO. 457/91 (15/08/91) Moore Drennan Nipshagen

Hearing loss.

The worker appealed a decision of the Hearings Officer denying entitlement for hearing loss. On the evidence, the worker was exposed to noise levels of 96 decibels for one and one-half hours per day. This was below the requirement of Board policy of three to four hours per day at that noise level. Further, the worker's hearing loss was a flat loss at all frequencies that was consistent with presbycusis rather than noise induced hearing loss. The appeal was dismissed. [9 pages]

Board Directives and Guidelines: Claims Services Division Manual, s. 122, p. 270, Directive 19

DECISION NO. 471/91 (15/08/91) Newman Preston Robillard

Continuing entitlement - Chest condition (xiphoid).

The worker suffered a compensable chest injury in August 1974. He returned to his job as a fork lift operator, but his chest pain continued. This pain was explained by a fracture or separation between the xiphoid and sternum that had failed to unite. In August 1975 compensable surgery was performed removing the xiphoid process and resectioning the xiphoid. He returned to his regular job until his retirement in 1985.

In 1984 the worker contacted the Board complaining of chest pain and shortness of breath which he attributed to the 1974 accident. He appealed the denial of a pension for a chest disability.

The Panel found that the worker had not suffered chest pain and shortness of breath continuously since the 1974 accident or 1975 surgery. The worker was able to perform relatively arduous work between 1975 and 1984. There was no evidence of complaint or medical treatment between 1975 and 1984. The worker did not complain about chest pain and shortness of breath during a thorough medical examination in 1990. During that examination, reference was made to the 1975 surgery and complaints about a variety of other aches and pains were reported by the worker.

The Panel was satisfied that the worker did suffer from chest pain and shortness of breath since 1984. However, based on a report obtained pursuant to s. 86h of the Act, which indicated that complaints like the worker's are not usually seen following this type of surgery, the Panel concluded that the accident and surgery were not significant contributing factors to the development of the worker's chest pain and shortness of breath. [9 pages]

DECISION NO. 494/91 (15/08/91) Hartman Jackson Howes

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 520/90 (16/08/91) Moore Ferrari (dissenting) Apsey

Stress - Significant contribution (of employment to disability) (subjective reaction of worker) - Disablement (stress) - Causation (thin skull doctrine) - Injuring process.

The worker appealed a decision of the Hearings Officer denying entitlement for a stress-related disability. The worker was a route sales person delivering and picking up linen from customers of the accident employer. He began working for the accident employer in 1979. In February and March 1988, he had severe panic attacks after being reprimanded by his superiors.

The worker reported to a supervisor, who reported to a service manager, who reported to the general manager. In 1985, a new general manager was hired. The new general manager had a more hands-on approach than his predecessor. The worker felt that changes implemented by the new general manager resulted in a deterioration of product quality. He also felt that the new general manager was reclusive and arbitrary in his interaction with workers. The worker began to complain, increasingly vociferously. In February 1988, he was given a formal reprimand by his service manager for his attitude and constant complaining. In March 1988, he received another reprimand from the service manager for infraction of inventory control requirements.

Reports from the worker's psychiatrist indicated that the worker had a ruthless father who was very rigid and demanding and that the worker selected a job where he would have some degree of order and security which entailed being away from authority.

The panic attacks were not reactions to isolated incidents but, rather, formed part of a developing condition. The majority of the Panel stated that stress claims lend themselves to a comparison of the work situation and the worker's personal situation. It is not sufficient to say that work contributed to the disability. There must be an identifiable injuring process associated with the worker's employment. The majority found that the worker's anxiety reaction was the product of an injuring process personal to the worker and not associated with employment.

The majority found that the worker believed that the general manager was out to get him but that this belief was unfounded. The worker was in no way singled out for harassment or unfair treatment. The worker's perception of the new general manager's attitude toward him was seriously distorted. The events at work that seemed to affect the worker did so because they fed into a preconceived belief in a pattern of harassment by the new general manager. This distortion of reality led the worker to a course of conduct that became increasingly confrontational and hostile. The worker's unfounded belief was the injuring process that gave rise to the disability and it was entirely personal.

Psychological factors were at work, long before the worker's breakdown, that led the worker to believe the general manager was a threat to him. These factors constituted a symptomatic preexisting condition. The worker's disability was a product of his mistaken belief. That belief and the effect it had on his conduct led entirely to the stress reaction. The appeal was dismissed.

The Worker Member, dissenting, applied the "thin skull" doctrine and found that the worker had a preexisting condition prior to 1988 but that it was not symptomatic. The work stressors identified by the worker relating to changes and events that took place under the new general manager could not be totally

discounted. The worker's preexisting psychological makeup was a significant contributing factor to development of his disability. However, it had not previously caused him to lose any time from work. The worker's perception of harassment stemmed specifically from events related directly to work. The injuring process evolved as part of the worker's actions and reactions directly related to changes made in the workplace and to real events that pertained exclusively to the worker.

The worker's perception of harassment was unfounded but there were real work stressors in the workplace.

Although the worker's personality makeup contributed in a significant way to development of his disability, the work stressors also contributed. [51 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to; Decision No. 918 (1988), 9 W.C.A.T.R. 48 reld to; Decision No. 652/87 (1988), 10 W.C.A.T.R. 75 consd; Decision No. 1018/87 (1989), 10 W.C.A.T.R. 82 consd; Decision No. 145/89 (1990), 14 W.C.A.T.R. 74 reld to; Decision No. 684/89 (1990), 16 W.C.A.T.R. 132 reld to; Decision No. 980/89 (1990), 13 W.C.A.T.R. 304 consd; Decisions No. 50/88 reld to, 952/89 reld to, 262/90 reld to

Board Directives and Guidelines: Operational Policy Manual, Document no. 03-01-02; Policy Proposal: Compensation for Disablements Arising from Workplace Stressors, April 20, 1990; Policy Proposal: Compensation for Disablements Arising from Workplace Stressors, Board Minute 1, April 26, 1991, p. 5447

Cases Considered: *Albertson's Inc. v. Workers' Compensation Appeals Board*, 182 Cal. Rptr. 304 consd; *Deziel v. Difco Laboratories Inc.*, 232 M.W. 2d 146, 268 N.W. 2d 1 (1978) consd; *Williams v. Western Electric Co.*, 429 A. 2d 1063 (1981) consd

DECISION NO. 913/89 (19/08/91) Chapnik Lebert Meslin

Supplements, temporary - Impairment of earning capacity - Significantly greater than is usual.

The worker was employed as a longshoreman when he sustained a work injury in 1970. In 1972 he was awarded pensions for his low back and right eye. Those pensions are currently assessed at 20% and 6% respectively. The worker received extensive rehabilitation services, including four years of training, as a result of which he worked full-time as a bookkeeper from March 1976 to November 1979. That job was terminated because he was taking too much time off work due to his back injury.

The worker was granted full supplementary benefits for a period from November 1979 to January 1980 and also for a period commencing in September 1982. He appealed the denial of supplementary benefits for the period between January 1980 and September 1982. During portions of the period in question, the worker was employed part-time as a bookkeeper. For the periods that he worked, he claimed supplementary wage loss benefits. For the periods that he was looking for work, he claimed full supplementary benefits. The Board refused these claims on the basis that the worker had already received extensive rehabilitation assistance and could have returned to part-time or full-time employment.

The worker was not entitled to supplementary benefits as his impairment of earning capacity was not significantly greater than usual for the type of injury suffered. The worker's extensive training and his work experience as a bookkeeper had improved his language, social skills and education level, thereby lessening the impact of the disability on his earning capacity. Medical examination found the worker not to be particularly disabled. During the period in question, the worker's capacity to earn income as a bookkeeper remained relatively high. Though he may have suffered an actual wage loss, his earning capacity was not impaired beyond his 26% pension level.

The granting of supplementary benefits before and after, but not during, the period in question had an appearance of arbitrariness. However, that was not a proper basis for the Tribunal to render a decision with respect to the period in question. The Tribunal was bound to render decisions in accordance with the Act, taking into account Board policies. [10 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to; Decision No. 1264/87 (1989) 12 W.C.A.T.R. 18 reld to; Decision Nos. 902/88 reld to, 466/89 reld to, 913/89L reld to
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-02; Claims Services Division Manual, s. 45(5), p. 134, Directive 1

DECISION NO. 465/91 (19/08/91) McCombie Jackson Nipshagen

Withdrawal (of application).

The employer withdrew its s. 21 application since the worker agreed to attend an examination with a different doctor. [3 pages]

DECISION NO. 466/91 (19/08/91) McCombie Jackson Nispahgen

Withdrawal (of application).

The employer withdrew its s. 21 application since the worker agreed to attend an examination with a different doctor. [3 pages]

DECISION NO. 467/91 (19/08/91) McCombie Jackson Nispahgen

Withdrawal (of application).

The employer withdrew its s. 21 application since the worker agreed to attend an examination with a different doctor. [3 pages]

DECISION NO. 495/91 (19/08/91) Hartman Jackson Howes

Access to worker file, s. 77 (issue in dispute).

The employer appealed the denial of access to the worker's rehabilitation file which was found not to be relevant to the issue of the level of SIEF relief. The employer argued that the rehabilitation file was relevant to the issue of entitlement to supplementary benefits.

At the time of the access request, the specific issue in dispute was the level of SIEF relief. Entitlement to supplementary benefits was the subject of a subsequent Board decision. Issues in dispute must be clearly set out at the time of the request to allow for informed decisions on relevance by the Board and on whether to object by the worker. The appeal was dismissed as the Panel agreed that the rehabilitation file was not relevant to the issue of the level of SIEF relief. [5 pages]

DECISION NO. 191/91 (20/08/91) Sandomirsky Higson Meslin

Supplements, temporary - Impairment of earning capacity - Significantly greater than is usual (advantaged worker).

The worker injured her wrist in April 1983 and received various forms of compensation benefits until March 1987. She was receiving an 8% pension. She claimed supplementary benefits from April 1987 to December 1988.

Despite having two years of training as an agricultural laboratory technician, the worker was employed as a part-time cashier from 1978 to 1983 because that job allowed her to spend more time with her young family and because it paid more than technician work. In 1984 she did babysitting work at home. She received a supplement while performing this work, but had to stop because of the heavy lifting involved.

The worker started working part-time in April 1987 at a golf shop and at a job involving waiting tables and cashiering. She left this work in December 1988 because of low pay and shift work. She was then sponsored by Manpower in a course to upgrade her agricultural laboratory technician qualifications. She had since obtained full-time employment in an agricultural laboratory.

When the worker returned to work in April 1987, she was a young woman (30 years old) with some skills training. For personal reasons she chose to limit her work activities to part-time employment while her children were young. The worker's wrist disability was not the factor limiting her earning capacity. The limiting factors were her need to upgrade her skills and her need to work part-time until her children were of school age.

The worker did not suffer an impairment of earning capacity significantly greater than usual. She was able to overcome her wrist disability because of her age, experience and educational background which allowed her to return to skilled employment. Her compensable disability had less of an impact on her earning capacity than it might have had on the average unskilled worker. The worker was not entitled to supplementary benefits. [7 pages]

WCAT Decisions Considered: Decision No. 495/88 (1988), 10 W.C.A.T.R. 241 reld to; Decision No. 657/90 reld to

DECISION NO. 304/91 (20/08/91) Robeson M. Cook Apsey

Second accident - Subsequent incidents (outside work).

The worker sustained a low back sprain at work in December 1988. He received chiropractic treatment and returned to his regular duties 19 days later. In August 1989, while on vacation, the worker suffered another low back sprain when he attempted to lift one end of a heavy tree branch. He returned to regular work 14 days later.

There was some evidence of back pain between the two accidents, but it was not sufficient to cause the worker to take medication, miss work or curtail his frequent and physically demanding sports activities. His infrequent visits to the chiropractor during this period were for regular follow-up maintenance rather than for onset of pain. After August 1989, the frequency of chiropractic treatment was much higher.

The Panel found that the December 1988 accident had resolved to the extent that it was not a significant contributing factor to the worker's disability after August 1989. The August 1989 incident was a separate accident and was the more serious of the two. It was the cause of the worker's subsequent disability. [11 pages]

DECISION NO. 340/91 (20/08/91) Robeson Beattie Chapman*Continuing entitlement.*

The worker injured his low back in December 1981 and received benefits until September 1982, when he returned to work. He stopped working in October 1983 because of influenza. While off work, he claimed that his back became painful and he was unable to resume employment until June 1984.

During the period from September 1982 to October 1983, there was little in the way of continuity of symptoms, complaint or treatment. He consulted a doctor only twice during this period and only complained of low back pain on one occasion. It was not until February 1984 that the worker's family doctor became aware that the worker was relating his problems after October 1983 to the December 1981 compensable accident. The worker stopped consulting his family doctor when the doctor questioned his complaints of back pain and his motivation to return to work. The evidence of other doctors which supported the worker's contentions was premised on descriptions given by the worker six or seven years after the accident.

For these reasons and other areas of vagueness in the worker's evidence, the worker was not entitled to benefits for the period from November 1983 to June 1984. [12 pages]

DECISION NO. 136/90 (21/08/91) Kenny B. Cook Jago*Access to worker file, s. 77 - Freedom of information (confidentiality provision).*

The worker appealed a decision of the Board to release medical information to the employer. The worker submitted that the Freedom of Information and Protection of Privacy Act, 1987, may protect the privacy of her medical records.

The Tribunal has consistently decided that s. 77 of the Workers' Compensation Act came within the exception in s. 21(1)(d) of the Freedom of Information Act for Acts expressly authorizing disclosure. However, on January 1, 1990, s. 67(2) of the Freedom of Information Act came into effect. It provides that the Freedom of Information Act prevails over a confidentiality provision in any other Act unless the other Act specifically provides otherwise.

The Panel found that s. 77 of the Workers' Compensation Act was not a "confidentiality provision" within the meaning of s. 67(2) of the Freedom of Information Act. Section 67(3), as enacted by s. 2 of the Freedom of Information and Protection of Privacy Amendment Act, 1989, listed certain confidentiality provisions of other Acts and provided that these provisions prevailed over the Freedom of Information Act. A review of these provisions showed that they were provisions which made it mandatory that certain records be kept confidential. Section 77 of the Workers' Compensation Act was not a confidentiality provision. Rather, it was a disclosure provision or a provision regulating access, intended to provide disclosure sufficient to meet the objective of allowing the employer to participate in a meaningful way in the appeal process. Therefore, the Freedom of Information Act did not prevail over the provisions of s. 77.

Access to the worker's file was granted to the employer. [12 pages]

Ss: 77(3), 102, 103

WCAT Decisions Considered: 427/88 reld to, 503/88 reld to, 761/88 reld to, 961/89 reld to, 136/90 reld to

Other Statutes Considered: Freedom of Information and Protection of Privacy Act, 1987, S.O. 1987 c. 25, ss. 21(1)(d), 42, 67(2), 67(3)

Cases Considered: Hornby Island Trust Committee v. Stormwell (1988), 53 D.L.R. (4th) 435 (B.C.C.A.) reld to

DECISION NO. 878/90 (21/08/91) McIntosh-Janis Fuhrman Nipshagen

Disablement (nature of work).

The worker's job as a sausage maker was physically demanding and also required him to repeatedly push a machine's start button with his right thigh. While working, he experienced numbness in his right leg and severe pain. His leg pain passed fairly quickly, but back pain persisted.

The worker was entitled to benefits. The preponderance of medical evidence supported the worker's claim that his condition resulted from his duties as a sausage maker. A back injury that had occurred nine years earlier had not caused any significant injury or continuing disability to the worker. [9 pages]

DECISION NO. 454/91 (21/08/91) McIntosh-Janis Robillard Preston

Delay (onset of symptoms).

The worker suffered a right shoulder injury from the repetitive nature of his work in September 1985. He returned to work in June 1986. In November 1987, he stopped work due to dizziness, headaches and a neck disability which the worker also related to the nature of his work in 1985.

Considering the medical evidence and the delay in onset of symptoms, the worker's condition was not related to his job duties. The appeal was dismissed. [5 pages]

DECISION NO. 478/91L (21/08/91) Moore Rao Chapman

Leave to appeal (good reason to doubt correctness) (consideration of evidence) - Procedure (absent parties) (leave to appeal).

In a preliminary matter, the Panel decided to proceed with this leave to appeal application despite the absence of the employer who had received full and adequate notice of the hearing. Even if leave was granted, the employer would have a further opportunity to participate in any hearing on the merits.

The worker sought leave to appeal an Appeal Board decision denying him continuing benefits for a wrist disability that had gradually come to involve his entire arm.

There were several references in the medical reports before the Appeal Board, including those of WCB doctors, to reflex sympathetic dystrophy. None of this medical evidence was referred to in the Appeal Board decision. The failure of the Appeal Board to cite or refer to any of the medical evidence that had been presented to it suggested that it may well have failed to consider a substantial and significant body of evidence in support of the worker's claim. The Appeal Board simply reflected a summary view which appeared to be lifted, without acknowledgement, from a WCB doctor's memo.

The Appeal Board also concluded that there was no evidence of a causal relationship between the ongoing disability and the compensable accidents, without explaining its reasons for doing so. There was good reason to doubt the correctness of the Appeal Board decision. Leave to appeal was granted. [9 pages]

WCAT Decisions Considered: Decision No. 466L (1987), 5 W.C.A.T.R. 57 apld; Decision Nos. 331 reld to, 669/87L distd

DECISION NO. 564/91 (21/08/91) McIntosh-Janis Jackson Meslin

Commutation (business investment).

The worker's request for a full commutation of his 34.7% pension was refused. He wanted the commutation to assist him in setting up an embroidery business. The worker had not adequately assessed the competition in the market, had unrealistically estimated his first year's profits and was unaware of the total costs of running a business. Neither his limited experience in the textile industry, nor his education prepared him for running this business. [4 pages]

DECISION NO. 591/91I (21/08/91) McIntosh-Janis Robillard Preston

Procedure (absent parties).

The hearing of the worker's appeal was adjourned due to the absence of the worker. The worker had forgotten about the hearing. [3 pages]

DECISION NO. 816/90 (22/08/91) Sandomirsky McCombie Chapman

Access to worker file, s. 77 (harmful information) (non-medical) - Access to worker file, s. 77 (privilege) (informer) - Evidence (privilege) (informer) - Freedom of Information.

The worker appealed a decision of the Access Specialist denying him access to certain information in his file under s. 77(2). The issue in dispute was the closure of his rehabilitation file. The documents contained information from an on-the-job training employer pertaining to the worker's termination and Board memos regarding threats by the worker against Board personnel.

Section 77(2) provides for withholding of "medical or other information" that would be harmful to the worker and for provision of "such medical information" to the worker's doctor. The Panel found that "other information" must be interpreted with reference to the term "medical". The only information that can be withheld is medical information that would be harmful to the worker. Section 77(2) cannot be used to withhold information from the worker in order to protect a third party who provided information to the Board.

Section 77 comes within the exceptions to the Freedom of Information and Protection of Privacy Act, 1987, in ss. 21(1)(d) and 42(e). Therefore, s. 49 of the Freedom of Information Act, which prohibits disclosure that would constitute an unjustified invasion of another individual's privacy, did not apply. Further, s. 77 was not a "confidentiality provision" within s. 67(2) of the Freedom of Information Act. Rather, s. 77 was an access provision.

The common law doctrine of privilege for informers did not apply to allow documents to be withheld. The common law doctrine is superseded by the statutory scheme of s. 77.

The appeal was allowed. The worker was entitled to access to the documents. [10 pages]

Ss: 77(2), 102

WCAT Decisions Considered: Decision No. 350/88 (1988), 9 W.C.A.T.R. 298 *reld to*

Board Directives and Guidelines: Operational Policy Manual, Document no. 01-04-11

Other Statutes Considered: Freedom of Information and Protection of Privacy Act, 1987, S.O. 1987 c. 25, ss. 21(1)(d), 42(e), 49, 67(2)

Cases Considered: *Bisaillon v. Keable*, [1983] 2 S.C.R. 60 *reld to*; *Moysa v. Alberta Labour Relations Board*, [1989] 1 S.C.R. 1572 *reld to*; *R. v. Hunter* (1986), 57 C.R. (3d) 1 (Ont. C.A.) *reld to*; *Salavutych v. Baker*, [1976] 1 S.C.R. 254 *reld to*

DECISION NO. 488/91 (22/08/91) Sandomirsky Ferrari Meslin

Delay (reporting injury).

The worker appealed a decision of the Hearings Officer denying entitlement for a back injury. The Panel found the worker to be a credible witness. The Panel found that the worker suffered the back injury when a gust of wind caused a door to slam on a ladder that the worker was carrying over his shoulder. The appeal was allowed. [8 pages]

DECISION NO. 503/91 (22/08/91) Sandomirsky Lebert Chapman

Commutation (home purchase).

The worker appealed a decision of the Hearings Officer denying commutation of the worker's pension. The worker wanted the commutation for the purpose of purchasing a home and liquidating debts.

Currently, the worker has a surplus and has been able to start paying off his debts. He was hopeful of obtaining a better job but this was not confirmed. His wife had a temporary job but was told that it may become permanent. The Panel felt that the worker's current financial situation was more viable and less stressful than it would be with a mortgage debt.

The commutation would not serve a rehabilitative purpose. The appeal was dismissed. [6 pages]

WCAT Decisions Considered: Decision No. 16 (1986), 1 W.C.A.T.R. 62 consd
Board Directives and Guidelines: Operational Policy Manual, Document no. 05-03-08

DECISION NO. 590/91 (22/08/91) Newman Rao Nipshagen

Adjournment (referral to Board).

The Panel was advised that the Board had decided to reconsider the worker's entitlement for chronic pain. The hearing was adjourned. The Board was requested to consider the worker's entitlement on an expedited basis. [3 pages]

DECISION NO. 562/91 (23/08/91) Strachan Rao Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a number of references which were not relevant. [3 pages]

DECISION NO. 563/91 (23/08/91) Strachan Rao Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a number of references which were not relevant. [4 pages]

DECISION NO. 565/91I (23/08/91) Strachan M. Cook Nipshagen

Adjournment (additional evidence).

The hearing was adjourned to obtain additional information since it became apparent at the hearing that the Board was considering entitlement for chronic pain. [3 pages]

DECISION NO. 444/90 (26/08/91) Bigras McCombie Meslin

Delay (onset of symptoms).

The worker suffered a low back injury in 1976. In 1986, he was diagnosed with osteoarthritis of the hip. The worker's widow appealed a decision of the Hearings Officer denying entitlement for the hip condition. On the evidence, the hip condition was not a direct result of the 1976 accident nor was it a consequence of the compensable back condition. The appeal was dismissed. [5 pages]

DECISION NO. 491/91 (26/08/91) Bigras Lebert Apsey

Suitable employment.

The worker suffered a shoulder injury in September 1987 while working on an assembly line producing rims and rings for the auto industry. He was awarded a 5% pension. The worker appealed a decision of the Hearings Officer denying temporary total disability benefits from April 1989 to September 1989.

Work offered by the employer as a burr shearer and end trimmer was not suitable. The worker had already attempted this job a number of times and could not do it without reinjuring his shoulder. A discharge report from HRC contained restrictions against overhead reaching and repetitive tossing of truck rims. These restrictions were based on consideration of the ring production job only. Other medical evidence showed that the worker could not perform activities requiring repetitive shoulder movement, such as those required for the burr shearer and end trimmer job.

The appeal was allowed. The worker was entitled to full temporary benefits during the period in question. [14 pages]

DECISION NO. 573/91 (26/08/91) Robeson Rao Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 574/91 (26/08/91) Robeson Rao Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 575/91 (26/08/91) Robeson Rao Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 121/89R (27/08/91) Signoroni Higson Sutherland

Reconsideration (consideration of evidence).

The worker's request to reconsider Decision No. 121/89 was denied. There is no obligation on a panel to address all arguments and evidence, although the decision should deal with the major arguments and evidence. In this case, the hearing panel did not elaborate in its reasons in order to spare the worker's feelings. Even so, the decision did not fail to address the major arguments and evidence. [4 pages]

WCAT Decisions Considered: Decision No. 95 (1986), 2 W.C.A.T.R. 61 reld to; Decision No. 850/87R (1990), 14 W.C.A.T.R. 1 reld to; Decisions No. 72R reld to, 72R2 reld to, 489/88R reld to, 723/88R reld to, 121/89 consd

DECISION NO. 130/90R (27/08/91) Signoroni Rao Meslin

Reconsideration.

The worker's request to reconsider Decision No. 130/90 was denied. [6 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decisions No. 72R reld to, 72R2 reld to, 130/90 consd

DECISION NO. 940/90 (27/08/91) Sandomirsky Beattie Jago
Brokalakis v. Alebakis

Section 15 application - In the course of employment (personal activity).

The defendants in a civil action applied to determine whether the plaintiff's right of action was taken away. The issue was whether the plaintiff was in the course of employment at the time of a motor vehicle accident. On the evidence, the worker was going on a personal shopping trip at the time of the accident. She was not in the course of employment. Her right of action was not taken away. [9 pages]

WCAT Decisions Considered: 799/87 consd

DECISION NO. 226/91 (27/08/91) Stewart M. Cook Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. The fact that it may be some time before a hearing takes place is not a reason to deny access at this time. [3 pages]

DECISION NO. 394/91 (27/08/91) Robeson Robillard Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a number of references which were not relevant. [5 pages]

DECISION NO. 576/91 (27/08/91) Robeson Rao Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a number of references which were not relevant. [5 pages]

DECISION NO. 773/88 (28/08/91) Signoroni Jackson Nipshagen

Cancer (pharynx) (tonsil) - Exposure (nickel) - Preexisting condition (leukemia) - Smoking - Evidence (epidemiological) - Benefit of the doubt.

The worker appealed a decision of the Appeal Board denying entitlement for squamous cell cancer which the worker related to employment in a nickel refinery from 1936 to 1972.

The worker took early retirement in 1972. In 1981, it was discovered that he had asymptomatic chronic lymphocytic leukemia (CLL). In 1982, he was diagnosed with tonsillar cancer and, later in 1982, a total laryngectomy was performed. There was a Board policy regarding nickel workers providing for entitlement for

laryngeal cancer but there was no policy on pharyngeal cancer.

The preponderance of medical evidence suggested that the tonsillar cancer was the primary cancer but this could not be established with certainty. However, the Panel accepted evidence of a s. 86h assessor that it was not reasonable to differentiate between laryngeal and pharyngeal cancer in terms of causation, considering that the sites are adjacent and that the pharynx is exposed to carcinogens in the same manner as the larynx. The assessor noted that the lining of a particular area can be exposed to a carcinogen and that there can be a field change in the lining towards becoming cancer in a number of different sites.

The Panel accepted evidence of another specialist that CLL could be considered a predisposing factor to the development of the cancer in question. However, considering the asymptomatic nature of the condition, there was no basis for finding that CLL was a significant contributing factor.

The worker was a smoker. Evidence was unequivocal that smoking was a significant contributing factor to development of the squamous cell cancer.

Based on a mortality study, the employer argued that there was no evidence to connect laryngeal or tonsillar cancer to the nickel refinery where the worker was employed. The Panel stated that the epidemiological evidence on which this study was based had to be assessed with caution. Pharyngeal cancer is not very common and not well classified by the available statistics. Considering the field change theory that was accepted by the Panel and the Board policy covering laryngeal cancer, there was some basis to link the cancer with the work exposure.

The Panel found the evidence in support of and against the worker's claim to be approximately equal in weight. Applying the benefit of doubt in favour of the worker, the Panel concluded that work exposure was a significant contributing factor to development of the worker's cancer. The appeal was allowed. [23 pages]

WCAT Decisions Considered: Decision No. 257/89 (1990), 14 W.C.A.T.R. 87 consd; Decision No. 773/88L reld to
Board Directives and Guidelines: Claims Services Division Manual, s. 122, p. 264, Directive 16

DECISION NO. 529/91 (29/08/91) McGrath Shartal Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a number of references which were not relevant. [3 pages]

DECISION NO. 531/91 (29/08/91) McGrath Shartal Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a number of references which were not relevant. [3 pages]

DECISION NO. 78/90 (29/08/91) Moore Fox Meslin

Chronic pain - Retroactivity - Temporary total disability - Permanent disability.

The worker suffered compensable injuries in 1978 and 1983. Under the 1983 claim, the worker's temporary benefits were reduced to 50% partial benefits from September to December 1985. The worker was receiving a

separate 10% pension for each of the two accidents.

There was some evidence of a non-organic component to the worker's disability following the 1978 accident, but the more significant features of that disability appeared after the 1983 accident. The preponderance of the medical evidence established that in September 1985 the worker was experiencing a non-organic disability that resulted from his two compensable accidents.

The Panel found that from September to December 1985 the worker was totally disabled by a compensable non-organic disability. In the various medical reports, the worker's condition was referred to as chronic pain syndrome, anxiety, depression, post-traumatic reaction and fibrositis. According to Board policy chronic pain was not recognized as a compensable disability until March 1986 and no benefits could be paid for chronic pain prior to that date. There is no such time limitation for disabilities resulting from fibrositis or from psychiatric conditions.

Although the worker's condition could best be described as chronic pain syndrome, in this case, the worker's benefits should not be subject to the March 1986 retroactivity date limitation. It would have been appropriate to apply that limit if the chronic pain disability had had the effect of elevating the worker's disability from a partial disability to a total disability. If the chronic pain aspect of the worker's disability were removed, he still would have been totally disabled by the combination of the organic disability, fibrositis, and post-traumatic stress disorder, all of which were compensable during the relevant period. The non-compensable chronic pain condition merely added to the fullness of the disability without elevating it from partial to total disability. The worker was thus entitled to full temporary benefits from September to December 1985.

The worker had reached maximum medical rehabilitation by December 1985 and was thus entitled to a pension for his non-organic condition after that date, rather than to temporary benefits. It is the Board's practice, when granting pensions, to weigh the compensable and non-compensable contributing factors to the worker's disability and to adjust the pension award accordingly. Pursuant to Board policy, the worker was not entitled to a pension for chronic pain between December 1985 and March 1986. It would appear to be appropriate for the Board to apportion whatever pension award it may grant, covering the period from December 1985 to March 1986, and to reduce the award by whatever amount the Board attributed to chronic pain.

The extent of the pension award was left to be determined by the Board. Any such award was to be retroactive to December 1985, subject to apportionment of the chronic pain portion of the award for the period from December 1985 to March 1986. [14 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 *reld to*; Decision No. 915A (1988), W.C.A.T.R. 269 *reld to*; Decision No. 669/87F (1989), 11 W.C.A.T.R. 54 *reld to*; Decision No. 638/89I (1989), 12 W.C.A.T.R. 221 *apld*; Decision Nos. 429 *reld to*, 393/88I2 *apld*
Board Directives and Guidelines: Operational Policy Manual, Document no. 05-03-11

Cases Considered: Review of Decisions No. 915 and 915A (1990), 15 W.C.A.T.R. 245 (WCB Bd. of Directors) *reld to*

DECISION NO. 455/91 (29/08/91) McCombie Shartal Sutherland

Second Injury and Enhancement Fund - Travel expenses (to hearing) - Parties (of record) - Parties (interest of worker) - Standing.

The worker suffered a low back injury in February 1976. It was estimated that the worker would be off work for less than two weeks and that no permanent disability was probable. However, the worker did not recover and his condition deteriorated. The worker appealed a decision of the Hearings Officer granting the employer 50% SIEF relief.

In a preliminary matter, the Panel considered travel expenses for the worker. The worker currently lives in British Columbia and did not attend the hearing. The worker's representative submitted that the worker's attendance was necessary and that travel expenses should be paid for the worker. The Panel denied the request. There was no reason to waive the general rule limiting travel expenses. The worker's testimony was not essential, considering that there was correspondence from the worker on file and considering the events under consideration were more than 15 years old. Further, the worker had no direct or indirect financial interest in the outcome of the appeal.

Although the worker had no financial interest in the outcome of the appeal, the worker had a presumed right of appeal. The worker had a right of standing by virtue of being a party of record within s. 86j(1). A party of record, who has a right to notice and to participation, also has a presumed right to bring an appeal.

On the merits, the Panel found that the worker had a preexisting condition, which apparently related back to an unreported injury suffered in 1972 while working for the same employer. It was not clear from Board policy whether an employer is entitled to SIEF relief if the preexisting condition is one for which the employer is responsible. However, in this case, there was no recognized compensable accident prior to 1976.

The Panel found that both the preexisting condition and the compensable accident were minor. According to Board policy, the employer was entitled to 50% SIEF relief. The appeal was dismissed. [15 pages]

Ss: 86j(1)

WCAT Decisions Considered: Decision No. 184 (1986), 3 W.C.A.T.R. 103 *reld to*; Decision No. 1069/87 (1987), 6 W.C.A.T.R. 259 *reld to*; Decision No. 238/89 (1990), 16 W.C.A.T.R. 96 *reld to*; Decision No. 607/90 (1990), 15 W.C.A.T.R. 236 *reld to*; Decision No. 674/90 (1990), 16 W.C.A.T.R. 299 *reld to*; Decisions No. 108/87 *apld*, 359/88 *consd*; 764/89 *reld to*, 169/90 *reld to*, 610/90 *reld to*, 186/91 *reld to* Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-28-03; Operational Policy Manual, Document no. 09-02-04

**DECISION NO. 579/91 (29/08/91) Onen Beattie Apsey
Scott v. Heppner**

Section 15 application - Independent operator (courier) - Employer - Worker.

The defendants in a court action applied for an order taking away the right of the plaintiffs to bring the action.

The defendants were father and son. The father had entered into a contract with Canada Post to deliver and pick up bags of mail along a specified route. The son was performing the tasks required by the contract when the truck that he was driving collided with a vehicle in which the plaintiffs were passengers. The plaintiffs were all employees of a Schedule 1 employer at the time of the accident. The issues were whether the father was a Schedule 1 employer, and if so, whether the son was a worker employed by the father.

The Panel was satisfied that the tests used by Tribunal panels to determine the existence of an employment relationship under the Workers' Compensation Act (Ont.) are equally applicable in determining whether a relationship falls within the definition of "employee" under the Government Employees Compensation Act (Can.).

The Panel found that the father was a Schedule 1 employer. The predominant character of the relationship between the father and Canada Post was that of a commercial contract, rather than an employment relationship. Although the contract placed restrictions on the conduct of the father's business (such as rate of payment of employees, type of truck to be used and dismissal of employees at the direction of Canada Post) the contract contemplated that the father would have employees and it was clear from the contract's wording that the parties intended a commercial transaction. The father bought and maintained his own truck,

hired a worker and did not receive ongoing direction from Canada Post. He operated an independent business.

The Panel found that the son was a worker employed by his father. The son drove the truck regularly, was paid an hourly wage, reported to his father and had no opportunity for profit or loss. The son had no definable relationship with Canada Post, but was an integral part of the courier business run by his father. This business fell within Class 20 of Schedule 1.

The plaintiff's right of action was taken away by s. 8(9) of the Ontario Act because the defendant father was a Schedule 1 employer, the defendant son was his worker and was in the course of his employment at the time of the accident, and because the plaintiffs were all Schedule 1 employees who were in the course of their employment at the time of the accident. [11 pages]

WCAT Decisions Considered: Decision No. 226/89 (1989), 11 W.C.A.T.R. 307 reld to; Decision Nos. 649/90 rel no, 868/90 reld to
Other Statutes Considered: Government Employees Compensation Act, R.S.C. 1985, c. G-5, s. 2

DECISION NO. 471/88RI (03/09/91) Kenny B. Cook Nipshagen

Reconsideration (consideration of evidence) - Reconsideration (error of law) - Ombudsman - Benefit of the doubt - Epididymitis.

The Tribunal received a letter from the Ombudsman outlining reasons for a possible recommendation to reconsider Decision No. 471/88. The Tribunal Chairman established this Panel to consider whether it was advisable to reconsider.

In Decision No. 471/88, the hearing panel had to determine whether there was a relationship between the worker's testicular problems and two compensable accidents. The worker had had a vasectomy some years earlier. The majority of the hearing panel noted that most of the medical opinions attributed the worker's problems to the vasectomy and found that the evidence did not support a relationship between the accidents and the disability. The Vice-Chairman of the hearing panel dissented on the basis that the majority did not consider whether the vasectomy created a preexisting condition which was aggravated by the compensable accidents. The Vice-Chairman also noted that all the evidence must be considered, including the temporal relationship between the trauma and the disability.

The Ombudsman suggested that the weighing of the evidence by the majority was unreasonable and that it was not clear that the majority considered non-medical factors.

In Decision No. 95R, the Tribunal stated that the persuasiveness of an Ombudsman's recommendation will vary depending on the category of case involved. With regard to re-weighing of evidence, the Ombudsman is at an obvious disadvantage.

The Panel had serious reservations about several points in the Ombudsman's letter regarding weighing of the evidence. The Ombudsman's reasons for questioning the reasonableness of the majority in preferring some medical opinions over others were not persuasive. On the basis of weight of the evidence, it was not advisable to reconsider.

However, there were two aspects of the majority decision which were of concern. Tribunal decisions serve as precedents for similar cases. The dissenting Vice-Chairman considered Decision No. 481, which referred to medical reports stating that trauma may be a co-factor in bringing on epididymitis. The majority did not deal with this decision. In addition, after Decision No. 471/88, several other Tribunal decisions accepted the view expressed in the articles referred to in Decision No. 481.

It also appeared that the majority did not properly consider the benefit of the doubt in s. 3(4). The majority considered only whether the medical evidence was evenly balanced for and against trauma as a possible causal factor. However, s. 3(4) is not limited to weighing of medical evidence. It requires all

the evidence for and against an issue to be weighed. The non-medical evidence (of temporal relationship) should have been weighed with the medical evidence in deciding whether the evidence was approximately equal.

These were significant defects which could have affected the outcome of the appeal. The Panel concluded that it was advisable to reconsider Decision No. 471/88. [11 pages]

Ss: 3(4)

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 consd; Decisions No. 72R reld to, 72R2 reld to, 481 consd, 471/88 consd, 580/89 reld to, 904/89 reld to

DECISION NO. 667/89LR2 (03/09/91) Moore B. Cook Preston

Reconsideration.

The worker's request to reconsider Decisions No. 667/89L and 667/89LR was denied. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decisions No. 72R reld to, 72R2 reld to, 667/89L reld to, 667/89LR reld to

DECISION NO. 699/90 (03/09/91) McIntosh-Janis Fuhrman Meslin

In the course of employment (parking lots) - In the course of employment (proceeding to and from work).

The worker was employed in a nursing home that operated on one floor of a retirement lodge. The home was a tenant of the lodge. The lodge did not permit its employees, or those of the home, to park on lodge property. The worker was driven to work by a co-worker. The car was parked in a lot that belonged to a church which was adjacent to the lodge. The worker slipped on ice in the church parking lot and injured herself.

The Panel found that the worker was not in the course of her employment at the time of the accident.

The employer had no control over the church parking lot. Use of the lot by its employees was a privilege accorded by the church as a matter of courtesy. The employer had no arrangement with the church under which it could insist on the continuing use of the lot by its employees. Maintenance of the lot, including snow removal, was the responsibility of the church. The church allocated the particular spots that were available to workers of the home. The employer only spoke to employees about parking at the church in response to complaints initiated by the church. The lot was a quasi-public area to which the public had unregulated access.

The fact that the worker did not depart on a personal errand between the time of arrival in the parking lot and the accident was irrelevant because this was not a case where the worker was required by the conditions of her employment to arrive at work by car. This may have been the most convenient procedure for the worker, but alternatives were available. Some co-workers arrived by public transit, while others had arranged parking at another site. [14 pages]

WCAT Decisions Considered: Decision No. 536 (1986), 6 W.C.A.T.R. 59 distd; Decision Nos. 1226/87 distd; 944/88 apld; 674/89 distd
Board Directives and Guidelines: Claims Services Division Manual, s. 3(1), p.47, Directive 21; Operational Policy Manual, Document nos. 03-02-02, 03-02-03

DECISION NO. 727/90 (03/09/91) Kenny Robillard Apsey

Rehabilitation, vocational (cooperation) - Availability for employment (job search) - Availability for employment (disabled by non-compensable condition).

The worker suffered a sudden onset of back pain in August 1986. The worker appealed a decision of the Hearings Officer granting only 50% benefits for temporary partial disability from November 1987 to August 1988.

On the evidence, the worker was temporarily partially disabled by his compensable condition subsequent to November 1987. During November, the worker was disabled by a non-compensable kidney stone problem which prevented him from being available for work. Therefore, he was disqualified from receiving full benefits during November. From December 1987 to May 1988, it was not unreasonable for the worker to rely on his doctor's continuing reports that he was unable to work. The worker was entitled to full benefits during this period. However, by May 1988, a specialist had advised that a bone scan, CAT scan and myelogram were normal and the Hearings Officer had released the decision finding that the worker was only partially disabled. The worker was disqualified from receiving full benefits subsequent to May 1988 for failure to conduct a job search.

The appeal was allowed in part. [12 pages]

WCAT Decisions Considered: Decision No. 121 (1986), 3 W.C.A.T.R. 81 reld to; Decision No. 137 (1987), 4 W.C.A.T.R. 87 reld to; Decision No. 529/87 (1987), 6 W.C.A.T.R. 158 reld to; Decision No. 548/87 (1987), 5 W.C.A.T.R. 176 reld to; Decision No. 1241/87 (1988), 8 W.C.A.T.R. 289 reld to; Decision No. 539/89 (1989), 12 W.C.A.T.R. 208 reld to; Decisions No. 159 reld to, 1148/87 reld to, 1214/87 reld to, 57/88 reld to, 187/88 reld to, 196/88 reld to, 387/88 reld to, 533/88 reld to, 728/88 reld to, 957/88 reld to, 539/89 reld to, 958/89 reld to
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-19-09

DECISION NO. 832/90 (03/09/91) Kenny B. Cook Jago

Aggravation (preexisting condition) (pseudarthrosis) - Medical opinion (pseudarthrosis) - Pseudarthrosis.

The worker, a bricklayer, received compensation benefits for a two week period in 1976 while he was off work due to low back pain. However, the Board denied benefits for four days of work missed in June 1977 and for a period starting in July 1978, on the basis that the worker's back disability resulted from congenital pseudarthrosis.

The Panel found that the worker did have a congenital pseudarthrosis condition which meant that the joint between the 5th lumbar vertebra and the sacrum was abnormal, leading to abnormal movement there. However, there was medical evidence that this was not necessarily the source of the worker's back pain. The worker did not have a low back disability before 1976. Even if the worker's underlying condition made him more susceptible to developing back problems, the disability that he experienced at this time resulted from his work which required him to work bent over for sustained periods.

The worker's back improved considerably after the 1976 accident but did not return to its pre-accident state. The 1977 episode of back pain was similar to the 1976 episode. The worker was performing a different type of bricklaying job than usual such that a lot of bending was involved. This disability resulted both from the underlying condition and the work. The same result applied to the 1978 disability. The worker did not return to bricklaying work after the 1978 incident.

The worker was entitled to full temporary benefits for the acute periods of disability in 1977 and 1978. He should also be assessed to determine if he was entitled to a pension. [14 pages]

WCAT Decisions Considered: Decision No. 832/90L reld to
Appendices: Report of Radiologist relating to Pseudarthrosis

DECISION NO. 891/90 (03/09/91) Sandomirsky B. Cook Jago*Fibrosarcoma.*

The worker was hit on the right leg by a wooden pallet in September 1987. There was significant swelling and bruising. In December 1987, a biopsy revealed that the worker had a fibrosarcoma. The worker appealed a decision of the Hearings Officer denying entitlement for the fibrosarcoma.

The Panel reviewed evidence from a specialist regarding the relationship between trauma and fibrosarcoma. It was unlikely that a malignant transformation would occur in an area of soft tissue injury arising in development of a tumour only months later. It was possible that trauma might increase the growth of a preexisting small tumour. This was more common in cases involving irradiation injury or burn injury rather than blunt trauma. However, the relationship between bruising and tumour growth was pertinent. The tumour cells might spread through the soft tissues during the spread of a hematoma.

The Panel concluded that it was more probable than not that the compensable accident contributed significantly to the growth of a preexisting tumour. The appeal was allowed. [10 pages]

WCAT Decisions Considered: 891/901 reld to

DECISION NO. 31/91 (03/09/91) McIntosh-Janis Ferrari Meslin*Pensions (assessment) (hearing loss).*

The worker appealed a decision of the Hearings Officer confirming a .4% pension for hearing loss. The award was consistent with Board policy for the level of hearing loss determined by the Board. However, the worker submitted that the test results relied on by the Board were not accurate.

There was inconsistency in the test results. A specialist explained that one test was conducted by the employer and that such tests are not usually relied on by the Board. Another test was described as inconsistent by the testers. The other tests were reasonably consistent with the exception of the last test which seemed to indicate a genuine worsening of the worker's condition.

The appeal was dismissed. The matter was remitted to the Board to consider the issue of further deterioration since the Board's decision. [5 pages]

DECISION NO. 64/91 (03/09/91) McGrath Robillard Meslin*Withdrawal (of appeal).*

The worker's s. 77 appeal was withdrawn on consent. The parties had settled their differences and the employer had withdrawn its application for access. [3 pages]

DECISION NO. 320/91I (03/09/91) Stewart Robillard Barbeau

Pensions (assessment) (preexisting condition).

The worker was awarded a 2% pension due to atrophic changes in the nasal lining resulting from work-related exposure to fumes. The worker had pre-existing allergies and a deviated septum. He appealed the level of the pension.

It was unclear to the Panel whether the worker's pension was reduced because of the worker's pre-existing conditions. It appeared that the effects of the pre-existing conditions were minor. If this were so, the worker would be entitled to a full award, according to Board policy. The Panel required more information with respect to the basis on which the pension award was assessed, particularly any effects that the worker's allergies and deviated septum may have had on the determination of the award. [6 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-02-20

DECISION NO. 496/91 (03/09/91) Hartman Jackson Howes

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for three words which were not relevant. [4 pages]

DECISION NO. 551/91 (03/09/91) Newman Lebert Seguin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a number of references which were not relevant. [4 pages]

DECISION NO. 566/91 (03/09/91) Moore Lebert Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 567/91 (03/09/91) Moore Lebert Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 568/91 (03/09/91) Moore Lebert Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a number of references which were not relevant. [3 pages]

DECISION NO. 577/91 (03/09/91) McGrath Jackson Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 335/91 (04/09/91) McGrath Drennan Barbeau

Access to worker file, s. 77 (chronic pain).

Access to the worker's file was granted to the employer, except for a number of references which were not relevant. The issue in dispute was entitlement to a pension for chronic pain. In assessing chronic pain, marked life disruption is considered. This is manifested by changes in social, occupational and home life behaviour. The majority of reports in issue in this case may be relevant to assessing chronic pain. References to family life were relevant as were references to the worker's hysterectomy and oophorectomy. However, references to a totally unrelated and irrelevant medical condition were deleted. [5 pages]

WCAT Decisions Considered: Decision No. 1083/87 (1988), 9 W.C.A.T.R. 181 reld to; Decision No. 1051/87 consid

DECISION NO. 449/91L (04/09/91) McGrath Rao Apsey

Leave to appeal (substantial new evidence) (subsequent Board decision) - Leave to appeal (good reason to doubt correctness) (subsequent Board decision).

The worker sought leave to appeal an Appeal Board decision which denied her ongoing benefits, subsequent to January 1979, for a back injury that occurred in July 1978. The worker suffered another back injury in September 1983. In October 1988 the worker was awarded a 15% pension retroactive to September 1983.

The pension awarded as a result of the 1983 accident did not constitute new evidence relating to the 1978 accident. In fact, the pension assessor specifically negated the importance of the worker's pre-1983 back condition. The pension award for the 1983 accident did not interfere with the validity of the Appeal Board's decision. There was no good reason to doubt the correctness of the Appeal Board's decision. Leave to appeal was denied. [4 pages]

DECISION NO. 124/90 (05/09/91) Kenny Robillard Nipshagen

Withdrawal (of appeal).

This application for a commutation was withdrawn at the worker's request. The worker had requested the

commutation to reduce the mortgage debt on a motel that he had purchased. The worker had sold the hotel at a loss due to declining income. He therefore no longer needed a commutation. [6 pages]

DECISION NO. 19/91 (05/09/91) Onen McCombie Barbeau

Heart attack - Delay (treatment) - Transportation industry (truck driver) - In the course of employment travelling).

The worker was a long distance truck driver. He left Ontario at noon on September 27 to deliver a load of beer to three locations in Maine. He did not have the required permits to haul alcohol but travelled at times so as to avoid inspections. He was sleeping in the cab of his truck on September 30 when he suffered a heart attack. He had to dress and walk over 500 feet to obtain assistance. The worker appealed a decision of the Hearings Officer denying entitlement for the heart attack.

The Panel found that there was no unusual physical or emotional stress associated with this trip. He was used to driving long hours and had carried loads without required permits before. Work activities during the two days prior to the onset of the heart attack were not a significant contributing factor. However, the worker did not receive treatment for several hours. The worker suffered greater damage to the heart muscle as a result of the delay. Had the worker been in a motel, he could have called for help by telephone. His location in the truck resulted in the delay. The delay was a significant contributing factor to the injury suffered by the worker.

The appeal was allowed. [10 pages]

Board Directives and Guidelines: Claims Services Division Manual, s. 1(1)(a), p. 8 Directive 6; Operational Policy Manual, Document no. 03-02-03

DECISION NO. 77/91I (05/09/91) McGrath Lebert Chapman

Evidence (admissibility) (improperly obtained evidence) - Procedure (communication with doctor) - Merits and justice - Parties (representation) (removal of representative) - Natural justice (removal of representative).

The Panel dealt with three preliminary matters arising in respect of the worker's appeal of a Hearings Officer decision that denied the worker entitlement to benefits for a wrist disability. The preliminary matters raised were: the employer's objection to the admission into evidence of a doctor's report requested by the worker's representative; the worker's objection to the admission into evidence of reports of the worker's family doctor obtained by the employer's representative without the worker's consent; the worker's request that the employer's representative be excluded from continuing to represent the employer.

The report obtained by the worker's representative did not contain misleading statements or unnecessary remarks going beyond a clear statement of relevant facts. If there was any bias by the author in favour of the worker, that was a matter that would affect the weight to be given to the evidence in the report, rather than its admissibility.

The employer's representative, without the worker's consent, requested "clarification" of the worker's doctor's earlier report. The doctor provided this information contrary to the regulations of the Health Disciplines Act (Ont.). Where a party has encouraged a doctor to breach those regulations, the Tribunal's concern about violation of the worker's privacy and the integrity of the Tribunal's process prevails over the need to obtain relevant evidence. Alternatives, including the Tribunal's investigative powers, are available to obtain critical evidence.

The employer's representative's contention that it was merely seeking "clarification", rather than new

information, was meaningless. The doctor's report did not appear to need clarification. The employer's letters to the worker's doctor requested opinions that were not previously expressed. In any event, the regulations do not recognize the distinction between clarification and new material. They forbid any communication by a doctor about his patient's treatment or condition, without the worker's consent. The employer's representative could not simply leave it to the doctor to decide what could not be communicated. It is the duty of those working in the workers' compensation field to know the terms of the Health Disciplines Act.

The Panel found that the reports of the worker's doctor requested by the employer's representative were not admissible, even though no objection had been raised in prior proceedings. The hearing before the Tribunal was a new trial. The Panel was not fettered by prior decision-makers in its ability to correct previous miscarriages of justice in accordance with the true merits and justice of the case. If further medical information should be required, the Panel would make the appropriate post-hearing requests.

In deciding whether to eject the employer's representative, the Panel had to balance the right of a party to choose its own representative and protection of the integrity of the Tribunal's process. It would only eject the representative if it was convinced of the presence of bad faith. The Panel had doubts as to whether the employer's representative's practice, of directly contacting doctors where "clarification" only was being sought, was a deliberate attempt to disguise a known unethical approach. As it may have been an honest mistake as to accepted procedure, the employer's representative was not excluded. [15 pages]

WCAT Decisions Considered: Decision No. 174 (1986), 2 W.C.A.T.R. 96 reld to; Decision No. 209/90 (1990), 14 W.C.A.T.R. 304 reld to; Decision Nos. 550/89 reld to, 600/89 consd; 879/89 consd; 905/89 reld to, 971/90 reld to

Other Statutes Considered: Health Disciplines Act, R.S.O. 1980, c. 196, Regulation 448, s. 27 item 22

DECISION NO. 333/91 (05/09/91) Moore B. Cook Clarke

Supplements, temporary (wage loss) - Supplements, temporary (rehabilitative purpose) - Discretion, Board (supplements, temporary) - Available employment (deemed earnings) - Pensions (assessment) (hepatitis).

The worker developed serum hepatitis as the result of a work accident. After receiving temporary benefits for three years, she returned to part-time work with the accident employer, working three hours daily. The worker's benefits were changed from temporary to provisional permanent benefits, in the form of a 60% award.

The Board subsequently reduced the provisional award from 60% to 25% and then made it permanent at the lower level. The worker was granted a temporary supplement, effective from the date of the reduction of the provisional award, but it was not a full wage loss supplement. The supplement was calculated on the basis of the six hours per day that the pension adjudicator deemed that the worker was capable of performing. In fact, the worker was only working four hours per day at that time. The Board later terminated the supplement completely. Six months after the supplement was terminated, the worker began full-time employment with the accident employer.

The Panel found that the reduction in the award from 60% to 25% was proper. The worker's condition had improved substantially and had stabilized. Her physiological condition was normal, but she still suffered from chronic fatigue.

The Board decided to give the worker a reduced supplement on the basis that she refused suitable

employment by failing to increase her employment from three to six hours daily. However, the worker did approach her employer about working six hours. The employer was only in a position to offer four hours of work per day at that time. The worker therefore was not disentitled from receiving a full supplement on this basis.

The provision which governed the calculation of the amount of supplement to be paid to the worker was s. 43(5a), as enacted by s. 136 of the pre-1989 Act. This provision did not contemplate payment of a partial wage loss supplement, as paid to the worker in this case. Section 43(5), as it read prior to the s. 136 amendments, did allow for less than a full supplement. But the amendments make it clear that only a full wage loss supplement is payable to a worker who has satisfied the requirements of s. 43(5). The worker had satisfied those requirements as she had not failed to accept suitable employment nor had she failed to co-operate in her rehabilitation. She was thus entitled to a full supplement for the entire period that any temporary supplement was payable.

The Board has a discretion to deny supplements when they have no valid rehabilitative purpose. The Board terminated this worker's supplement because it had already been paid for one year and because it was for a minimal amount. The amount, as calculated by the Board, was minimal only because it was based on the six hours that the worker was deemed capable of working, rather than the four hours actually worked. The fact that the supplement had been paid for a year did not mean that there was no further rehabilitative purpose in continuing it. The worker and the accident employer were trying to return the worker to full-time employment and such work did in fact become available six months after the supplement was terminated. The time limit that the Board placed on the payment of the supplement was inappropriate in the circumstances.

The worker was entitled to a full wage loss supplement from the time of the reduction of the provisional award until the time of her return to full-time employment. [11 pages]

Ss: 136(1) pre-1989 [re 43(5a) pre-1985]

WCAT Decisions Considered: Decision No. 1264/87 (1989) 12 W.C.A.T.R. 18 *reld to*

DECISION NO. 363/91I (05/09/91) Sandomirsky Shartal Apsey

Waiver (right to compensation) - Statutory interpretation (public policy) - Worker.

The worker began to see her doctor in February 1983 for emotional problems that she related to her deteriorating employment situation. In July 1983 she was terminated by her employer. The worker grieved her dismissal. Minutes of settlement relating to the grievance, signed by the worker in January 1986, included a release of all claims against the employer.

The worker had claimed compensation benefits for her stress-related disability in 1985. The employer argued that the Tribunal had no jurisdiction to hear the worker's appeal from the Hearings Officer's dismissal of her compensation claim because the release barred the worker from claiming benefits.

The worker did not waive her right to claim compensation benefits by signing the waiver. Section 16 of the Act expressly protects workers from waiving their entitlement to benefits. However, even without s. 16, compensation for work injuries is a statutory right which parties cannot contract out of, as a matter of public policy.

The employer argued that this worker could not be characterized as a worker under the Act because she did not claim benefits until two years after her employment was terminated. The Panel did not accept this argument which would have the effect of excluding from the Act workers with disabilities arising after they

had left their employment. That such a result is not the intent of the Act, is indicated by the Act's express provision for payment of benefits with respect to industrial diseases and other latent disabilities, and by the Act's lack of a time limit in respect of applications for benefits.

The issue of the fixing of the amount of compensation so as to avoid the worker receiving double compensation, pursuant to s. 46(1), was a separate issue from the question of whether the worker suffered an injury by accident arising out of and in the course of employment. The Panel directed that the hearing of this appeal, with respect to the latter issue, be reconvened. [7 pages]

Ss: 16, 46(1)

WCAT Decisions Considered: Decision No. 53/87 (1987), 5 W.C.A.T.R. 97 consd; Decision No. 850/87R (1990), 14 W.C.A.T.R. 1 reld to; Decision No. 1004/89 (1990), 17 W.C.A.T.R. 64 consd; Decision Nos. 850/87 reld to, 967/89A reld to

Cases Considered: Ontario (Human Rights Commission) v. Etobicoke (Borough), (1982) 132 D.L.R. (3d) 14, (S.C.C.) apld; K v. S. (D.), (May 7, 1991), Unreported, Ont. Ct. (Gen. Div.) reld to

DECISION NO. 485/91 (05/09/91) Robeson Rao Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 552/91I (05/09/91) Newman Lebert Seguin

Adjournment (additional evidence) - Re-employment (determination re return to work).

The employer appealed a decision of the Reinstatement Officer finding that the employer failed to fulfil its obligations under s. 54b. The Panel had a concern with the adequacy of the Board's investigation of the facts of the case and with the nature and quality of the Board's determination of the worker's fitness to return to work. The decision was reserved pending receipt of a response to a request for further information regarding the determination of fitness. [6 pages]

WCAT Decisions Considered: 372/91 consd

DECISION NO. 580/91 (05/09/91) McCombie M. Cook Meslin

Accident (occurrence).

The worker appealed a decision of the Hearings Officer denying entitlement for a knee injury. The Panel accepted the worker's evidence that the accident occurred when the worker fell from a stepladder. The appeal was allowed. [6 pages]

DECISION NO. 469/91 (06/09/91) Robeson Higson Apsey

Medical examination (section 21).

The worker was required to attend a medical examination. The employer had valid compensation goals regarding payment of temporary partial benefits and level of pension. The employer maintained that it required the examination since there were contradictions and inconsistencies in the available reports and since the pension was awarded on the basis of the examination of only one Board doctor. The Panel found that the examination was important to achieving the employer's compensation goals. [6 pages]

DECISION NO. 595/91 (06/09/91) Bigras Ferrari Chapman

Medical examination (section 21) - Procedure (section 21) (access to worker file).

The worker was not required to attend a medical examination required by the employer. The employer had not applied for access to the worker's file under s. 77. [5 pages]

WCAT Decisions Considered: Decision No. 174 (1986), 2 W.C.A.T.R. 96 *reld to*; Decision No. 185 (1986), 3 W.C.A.T.R. 110 *reld to*; Decision No. 306 (1986), 2 W.C.A.T.R. 134 *reld to*

DECISION NO. 596/91 (06/09/91) Bigras Ferrari Chapman

Medical examination (section 21).

The worker was required to attend a medical examination. On the evidence, further tests were required to determine the issue of the worker's entitlement to a pension for hearing loss. [4 pages]

DECISION NO. 479/90R (09/09/91) Signoroni Higson Chapman

Reconsideration.

The worker's request to reconsider Decision No. 479/90 was denied. A new medical report restated one of two conflicting medical theories but did not introduce new evidence. Further, the theory rested on alleged findings of fact which were not within the mandate of the doctor. [5 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 *consd*; Decisions No. 72R *reld to*, 72R2 *reld to*, 479/90 *reld to*

DECISION NO. 972/90R (09/09/91) Moore Jackson Barbeau

Reconsideration - Medical examination (section 21).

The employer applied for a reconsideration of Decision No. 972/90, in which the employer's application

for a medical examination under s. 21 was denied.

The employer submitted that its ability to participate fully in the appeal process required that it be given an opportunity to have the worker examined before each level of appeal in the adjudication process. The employer wanted an opportunity to develop additional evidence to support its position.

The purpose of s. 21 is to ensure that a decision will be made based on the real merits and justice of the case. The purpose is not to allow the employer to further strengthen its arguments against the worker's case. The correct standard was applied in this case.

The application for reconsideration was denied. [7 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 consd; Decision No. 306 (1986), 2 W.C.A.T.R. 134 reld to; Decision No. 626 (1987), 4 W.C.A.T.R. 253 reld to; Decisions No. 72R reld to, 72R2 reld to, 972/90 reld to

DECISION NO. 22/91 (09/09/91) Hartman Beattie Jago

Disablement (repetitive work).

The worker appealed a decision of the Hearings Officer denying entitlement for a low back condition. The worker had a preexisting back condition which had not been symptomatic for at least one year prior to the onset of symptoms at work. On the evidence, the Panel found that the repetitive nature of the worker's job was a significant contributing factor to the onset on low back pain. The appeal was allowed. [9 pages]

DECISION NO. 218/91I (09/09/91) Sandomirsky Higson Barbeau

Investigation by Tribunal (whether required).

The employer appealed a decision of the Hearings Officer granting entitlement for a back disability. The employer presented witness statements from co-workers but did not present any oral evidence or submissions.

After the hearing, the Panel reviewed the file in detail and found that it could not reach a decision without the benefit of oral testimony. The issues in the case turned on credibility and oral testimony was critical. The Tribunal has power to investigate. It is the Panel, not the parties, that must decide whether further evidence is necessary.

In the circumstances, the Panel constituted itself as a Case Direction Panel and requested that a new hearing be scheduled before a different panel. [4 pages]

DECISION NO. 328/91 (09/09/91) Sandomirsky Robillard Ronson

Continuity (of symptoms).

The worker suffered a compensable back strain in August 1979. He laid off work in June 1984 due to back pain. The worker related his condition in 1984 to the accident in 1979 or to the nature of his work as a truck driver from 1979 to 1984. The worker appealed a decision of the Hearings Officer denying entitlement in 1984.

There was continuity of symptoms. The worker had no back problems prior to 1979. He developed degenerative disc disease subsequent to the 1979 accident. Medical opinions supported a relationship between his ongoing condition and the 1979 accident. The appeal was allowed. [7 pages]

DECISION NO. 521/91 (09/09/91) McGrath B. Cook Preston

Medical examination (section 21).

On consent, the worker was required to attend a medical examination by a doctor selected by the employer. [3 pages]

DECISION NO. 528/91 (09/09/91) Bigras Robillard Chapman

Disablement (repetitive work) - Carpal tunnel syndrome.

A 23 year old worker began employment as a labourer in September 1986. One month later, he was diagnosed with bilateral carpal tunnel syndrome. The employer appealed a decision of the Hearings Officer granting entitlement.

The worker had no previous history of wrist or hand problems nor any pathological condition known to cause carpal tunnel syndrome. The worker exerted considerable strain in his arms and wrists when he started heavy work with the employer in September 1986. After the initial onset of wrist discomfort, the worker continued to make extensive use of his wrists in work which included use of jackhammers, shovelling rock and hammering nails. There was medical evidence that not only vibration causes carpal tunnel syndrome but also repetitive exertion with low and high force and pressure at the base of the palm.

The Panel concluded that the injury was caused by work related factors. The appeal was dismissed. [11 pages]

DECISION NO. 588/91 (09/09/91) Newman M. Cook Meslin

Accident (occurrence).

The worker appealed a decision of the Hearings Officer denying entitlement for a knee disability. On the evidence, a minor injury at work rendered a preexisting degenerative condition symptomatic. The injury, and the worker's attempts to continue working, triggered the continuing symptoms and the need for surgery. The appeal was allowed. [3 pages]

DECISION NO. 148/90R (11/09/91) Bigras M. Cook Apsey

Reconsideration.

The worker's request to reconsider Decision No. 148/90 was denied. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 consd; Decision No. 850/87R (1990), 14 W.C.A.T.R. 1 reld to; Decisions No. 72R reld to, 72R2 reld to, 148/90 reld to

DECISION NO. 659/90 (11/09/91) Hartman Lebert Preston

Hearing loss.

The worker appealed a decision of the Hearings Officer denying entitlement for hearing loss. The Panel accepted evidence of a s. 86h assessor that the hearing loss in the right ear was noise induced. Regarding the left ear, there was an element of the hearing loss that was not noise induced. The Panel applied the benefit of doubt in favour of the worker and accepted the assessor's suggestion to attribute the hearing loss in the left ear to noise up to, but not exceeding, the extent granted for the right ear.

The appeal was allowed. [8 pages]

Board Directives and Guidelines: Claims Services Division Manual, s. 122, p. 270, Directive 19

DECISION NO. 338/91 (11/09/91) Onen Jackson Howes

Class of employer (excavation) - Class of employer (trucking) - Board Directives and Guidelines (class of employer) (subcontracting).

The employer appealed a decision of the Hearings Officer finding that the employer was correctly classified in Class 21, Rate 753 for construction excavation. The employer submitted that it should be classified in Class 20, Rate 656 for trucking.

The employer was in the business of excavating and removing fill from construction sites. There was no question that the business of the employer concerned construction to some degree. However, a detailed review of the evidence showed that most of the equipment and over 90% of the cost of a job was related to the haulage of the fill. Although the employer subcontracted out a significant part of the haulage work, it was Board policy to view the subcontracts as if they were the work of the employer itself. This was a reasonable approach and the Panel considered the subcontracts to be an integral part of the employer's activities for purposes of classification.

The primary purpose of the business was bulk removal of fill. This service is provided in large part through trucking. The trucking class was the most reasonable category for classification of this service. The appeal was allowed. [8 pages]

WCAT Decisions Considered: 806/89 consd

Board Directives and Guidelines: Operational Policy Manual, Documents no. 08-01-04, 08-03-03

Regulations Considered: Reg. 951, Schedule 1 class 20, Schedule class 21 item vi

DECISION NO. 428/91 (11/09/91) Chapnik Robillard Meslin

Procedure (absent parties) - Pensions (assessment) (ankle).

The worker suffered a fractured tibia at the ankle joint in 1982. He was awarded a 3% pension. The worker appealed a decision of the Hearings Officer denying entitlement for a back condition and confirming the 3% pension.

In a preliminary matter, the Panel decided to proceed with the appeal in the worker's absence. The worker's representative attended the hearing. The worker lived in Finland and had a medical condition which prevented him from travelling. The worker had written stating his request that the hearing proceed in his absence.

The worker was not entitled to benefits for the back condition. It was not established that the worker suffered direct trauma to his back in the accident or that the condition was related to altered gait.

The worker had been assessed for a pension three times and the 3% award had been confirmed each time. He had full range of motion and power but there was some evidence of crepitus and muscle wasting. The Panel was satisfied that the Board correctly assessed the residual disability.

The appeal was dismissed. [9 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 *reld to*; Decision No. 278/90 *reld to*

DECISION NO. 489/91 (11/09/91) Moore Shartal Chapman

Intervening causes.

The worker was involved in a compensable accident in November 1987. He received temporary total disability benefits until October 1988 and temporary partial disability benefits thereafter. The worker appealed a decision of the Hearings Officer reducing benefits as of October 1988.

The worker was involved in a non-compensable motor vehicle accident in August 1988. The Board reduced benefits because of the presence of non-compensable factors in the ongoing disability. The Panel found that the worker was temporarily totally disabled just prior to the motor vehicle accident in 1988. The motor vehicle accident added to the overall disability. However, the worker continued to have the same disabling symptoms as he had prior to August 1988. The worker continued to be totally disabled by his compensable condition subsequent to August 1988. The motor vehicle accident added to the overall disability but did not override or negate the impact of the compensable injuries.

The appeal was allowed. [7 pages]

DECISION NO. 530/91 (11/09/91) McGrath Shartal Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 877/90 (12/09/91) Kenny Ferrari Apsey

Temporary partial disability (wage loss benefits) (self-employed worker) - Suitable employment (deemed earnings) - Pensions (assessment) (enhancement factor) - Psychotraumatic disability.

An electrician suffered an injury to right side of his upper neck in 1980. He also suffered an injury to his left shoulder in September 1981 for which he was awarded a 10.5% pension (8% for the left shoulder and a 2.5% enhancement factor due to a non-compensable right shoulder disability). The worker appealed granting of only 50% benefits from September 1980 to September 1981, denial of ongoing benefits for neck disability, denial of benefits for a psychiatric disability and denial of an increase in the pension.

The worker was temporarily partially disabled during the period in question. During the period, the worker was self-employed as an electrician. He was investigated by the Board for fraud, but the Board extended the benefit of the doubt and no action was taken.

The worker was entitled to benefits under s. 41(1)(a) of the pre-1985 Act for the difference between average earnings prior to the accident and the average amount he was able to earn in some suitable employment or business after the accident. The business established by the worker was suitable, concerning his age, compensable and non-compensable disabilities and the supervisory nature of the work. From September 1980 to September 1981, the worker had a profit of about \$2,400. However, this was not indicative of what he was able to earn in the business. While under investigation for fraud, he completed an old contract but did not seek new business. Therefore, the Panel did not know what he could have earned had. In the circumstances, 50% benefits was a reasonable estimate of what the worker was able to earn.

On the evidence, the worker had some ongoing neck disability, although the Panel could not decide whether it was organic or non-organic in nature. The worker did not have a psychiatric condition, except possibly for the neck disability. Anxiety resulting from the fraud investigation was not a psychiatric disability. His cutback in activities was a relatively normal reaction to the investigation.

The matter was referred back to the Board to determine whether the neck disability and any deterioration in the right shoulder disability would affect the enhancement factor in the worker's pension.

The appeal was allowed in part. [28 pages]

Ss: 40(2)(a) [41(1)(a) pre-1985]

DECISION NO. 603/91 (13/09/91) Onen Jackson Barbeau

Disablement (awkward position) - Construction (plasterer) - Disc, degeneration (cervical).

The worker worked as a plasterer from 1948 to 1986. He suffered from a neck disability that also affected his left shoulder and arm. The worker began to feel neck discomfort in the 1950s and started to seek sporadic medical treatment in the 1960s. His problems were attributed to symptomatic degenerative disc disease. By 1986 the worker was unable to continue working. X-rays taken in the 1980s showed gross degenerative changes to the cervical spine.

The worker was required to look up at ceilings for long periods of time, bending and twisting it in difficult positions. He also was required to work in tight spaces that exacerbated the amount of bending and twisting in his neck. There was medical evidence that preexisting degenerative disc disease can become

symptomatic as a result of repetitive trauma which can include loading and torsional stresses to the cervical spine. The worker's doctors were of the view that the work contributed to the worker's disability.

The worker was entitled to benefits for his neck, arm and shoulder problems. [8 pages]

Board Directives and Guidelines: Interpretation Bulletin - Interpretation of "Personal Injury by Accident", "Chance Event", and "Disablement", Policy and Program Development Department, October 19, 1988

DECISION NO. 604/91 (13/09/91) Onen Jackson Barbeau

Angina pectoris - Aggravation (preexisting condition) (heart condition) - Heart attack.

The employer appealed a decision holding that the worker's employment aggravated the worker's heart condition.

The worker was a chef for a railway dining car. In January 1984, the position of second cook was eliminated, leaving the worker to work alone in the kitchen. The job involved more than just meal preparation for passengers and crew. It also required loading supplies, handwashing the dishes and large pots, and cleaning the kitchen. The worker had some of the risk factors associated with the development of atherosclerosis: smoking, family history, advancing age and male gender.

In January 1984, the worker was exposed to new working conditions that were unusual, stressful and physically demanding for him. At that time, the worker began to suffer chest pains on exertion or exposure to cold. In March 1984 he suffered an acute and disabling episode of angina at work.

The Panel found that the worker's increased workload in January 1984 caused his underlying coronary artery disease to become symptomatic in the form of angina. It was initially mild, but the acute episode in March 1984 stopped him from working. The angina was recurrent and had in fact worsened. The worker was thus entitled to compensation for his disabling angina condition.

Three weeks after the acute episode of angina at work, the worker suffered a heart attack. During the intervening period, the worker had been at rest in the hospital and at home. The heart attack did not arise out of the worker's employment.

The employer's appeal was dismissed. [12 pages]

WCAT Decisions Considered: Decision Nos. 879/89 *reld to*, 818/90 *reld to*
Board Directives and Guidelines: Operational Policy Manual, Document no. 03-02-09

DECISION NO. 210/91 (16/09/91) Chapnik M. Cook (dissenting) Nipshagen

Accident (occurrence) - Credibility - Evidence (rejection of direct testimony).

The worker appealed a decision of the Hearings Officer denying entitlement for a low back strain which the worker claimed he suffered in an unwitnessed accident in June 1987. The worker was a truck driver. He claimed that he suffered the injury while unloading patio stones from his truck.

The majority of the Panel found the worker to be an evasive witness. There were inconsistencies in his evidence. There was also evidence from a co-worker and documentary evidence which contradicted the evidence of the worker. In addition, there was a delay of two days in seeking medical attention and two weeks in

reporting the injury. The majority found that the worker's evidence was out of harmony with the preponderance of probabilities suggested by the other available evidence.

The appeal was dismissed.

The Worker Member, dissenting, found that the inconsistencies in the worker's evidence were not so significant as to cast doubt on the worker's credibility. It was plausible for the worker to have injured his back as he described and there was no convincing alternative explanation. [14 pages]

WCAT Decisions Considered: Decision No. 565 (1987), 4 W.C.A.T.R. 238 *reld to*; Decision No. 307/90 (1991), 17 W.C.A.T.R. 127 *consd*; Decisions No. 232 *reld to*, 840 *reld to*, 846 *reld to*, 451/88 *consd*

Cases Considered: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A) *consd*

DECISION NO. 510/91 (16/09/91) Bigras B. Cook Apsey

Aggravation (preexisting condition) (bronchiectasis) - Bronchiectasis - Exposure (silica).

The worker was a foundry worker from 1969. In 1976, he was diagnosed with bronchiectasis. The worker appealed a decision of the Appeals Adjudicator denying entitlement for bronchiectasis which the worker related to exposure to silica.

On the evidence, the Panel found that the bronchiectasis was a condition that was preexisting at the time the worker commenced employment at the foundry. Considering the very slight progressive deterioration of the worker's condition during the years the worker worked at the foundry, including 10 years following removal from exposure, the Panel found that there was no causal connection between his condition and employment. The appeal was dismissed. [12 pages]

DECISION NO. 636/90 (17/09/91) Pfeiffer Lebert Seguin (dissenting)

Consequences of injury (residual weakness).

The worker suffered a low back injury in 1984 for which she was awarded a 15% pension. The worker appealed a decision of the Hearings Officer denying entitlement for injuries suffered in falls in 1988. The worker claimed that the falls occurred when her leg gave out and that this was caused by weakness in her leg resulting from the compensable accident in 1984.

The majority of the Panel accepted the worker's evidence and relied as well on a medical report relating leg problems to a disc protrusion.

The appeal was allowed.

The Employer Member, dissenting, found that the falls happened when the worker slipped and did not result from her leg giving way. The supportive medical report was based on the worker's own history that her leg gave out. [8 pages]

DECISION NO. 909/87R (18/09/91) Bigras B. Cook Barbeau*Reconsideration - Health care (dental aid).*

This was a rehearing of Decision No. 909/87 following the worker's successful request for a reconsideration of that decision.

The worker had sustained damage to her teeth in a compensable accident. The Board paid for the restoration of the broken teeth by the installation of partial plates, under its health care benefits policy.

The worker had the partial plate replaced by a "fixed bridge" permanent denture. The original Panel denied entitlement to cover the costs of the fixed bridge which it found was not necessary to lessen or remove the worker's handicap. The original Panel found that the fixed bridge was only a means to improve the worker's appearance and confidence.

There was new dental evidence available which established that installation of the fixed bridge was necessary to lessen the worker's handicap. The worker was one of the minority of people who could not accept partial dentures. Permanent dentures could not have been installed at an earlier time because the worker's teeth were suspected to be subject to further problems. Additional treatment had since been performed. The permanent bridgework improved the worker's masticatory function and may also have alleviated her periodontal problems.

The cost of the fixed bridgework was compensable. Decision No. 909/87 was varied accordingly. [5 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decision No. 850/87R (1990), 14 W.C.A.T.R. 1 reld to; Decision Nos. 72R reld to, 72R2 reld to, 909/87 reld to, 909/87R1 reld to

DECISION NO. 30/89R (18/09/91) Sandomirksy Lebert Apsey*Reconsideration.*

The worker's request to reconsider Decision No. 30/89 was denied. The original hearing panel found that the worker's back disability in 1985 was not related to compensable accidents in 1970, 1973 or 1980. The reconsideration application raised the issue of the relationship of the back condition to compensable accidents prior to 1970. This was a new issue that had not been considered by either the Board or the original hearing panel.

It was open to the worker to return to the Board for adjudication of this new issue. [5 pages]

WCAT Decisions Considered: 30/89 reld to

DECISION NO. 875/90 (18/09/91) Bradbury Robillard Clarke*Exposure (asbestos) - Smoking - Chronic obstructive lung disease.*

The worker appealed a decision of the Hearings Officer denying entitlement for chronic obstructive lung disease which the worker claimed was related to exposure to asbestos.

The Panel found that smoking was the significant contributing factor to the worker's condition and that

exposure to asbestos was not a significant contributing factor.

The appeal was dismissed. [3 pages]

Note: Full reasons will be issued by the Panel at a later date.

**DECISION NO. 522/91I (18/09/91) Chapnik Lebert Nipshagen
Bruce R. Smith Ltd. v. Brown**

*Procedure (absent parties) - Adjournment (peremptory hearing date) - Three week rule (witnesses)
(summary of evidence).*

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken away. The plaintiff was representing himself and did not attend the hearing but had sent a number of letters requesting further information about the defendants' witness list.

The plaintiff was entitled to a more comprehensive summary of proposed evidence than was submitted by the defendants. However, the Panel noted that the summary of evidence is not intended to be all-inclusive. It is a general summary and is not a substitute for oral evidence given at a hearing in which details may arise which were not included in the summary.

The plaintiff's testimony was relevant to determination of the issues on this application. In the circumstances, the defendants were directed to provide a more complete outline of testimony and the hearing was adjourned. The new hearing date would be peremptory to the plaintiff. [8 pages]

Practice Directions Considered: Practice Direction No. 7 (1986), 1 W.C.A.T.R. 231

DECISION NO. 611/91I (18/09/91) Sandomirsky Fox Apsey

Procedure (additional medical evidence) - Evidence (testimony from other decision) - Dupuytren's contracture.

The worker was appealing a decision that denied him benefits for Dupuytren's Contracture. He was an assembly line worker whose duties included tightening bolts with an air gun. There were conflicting Tribunal decisions relating to the compensability of Dupuytren's Contracture in similar circumstances. The medical literature on the etiology of Dupuytren's Contracture was also uncertain. The Panel thus required more medical information before it could decide this matter.

A doctor, who was the acknowledged leading Canadian expert on Dupuytren's Contracture, was scheduled to appear before another panel of the Tribunal to provide information on the relationship between manual labour and Dupuytren's Contracture. The Panel could not make a decision in this case until it had reviewed that expert's evidence.

The fact that this expert had been a consultant to the Board did not indicate a bias against workers. A copy of the transcript of the expert's testimony was to be sent to the worker's representative so that he would have the opportunity to present further evidence in response. [5 pages]

WCAT Decisions Considered: Decision Nos. 98/87 reld to, 795/87 reld to, 300/88 reld to, 434/88 reld to, 314/91 reld to, 318/91 reld to

DECISION NO. 514/91 (19/09/91) Chapnik B. Cook Meslin
Thomas v. Marr

Section 15 application - In the course of employment (personal activity) - In the course of employment (reasonably incidental activity test).

The plaintiff in a civil case applied to determine whether his right of action was taken away. The issue was whether the defendant was in the course of employment at the time of a motor vehicle accident.

The defendant was a school bus driver. She had performed a safety inspection on the bus and radioed the employer to say that she was mobile. Before making her first pick-up, she intended to take her child to a babysitter, as she did every morning. The employer knew and approved of this arrangement. Since drivers were not permitted to take their own children when picking up students, the trip to the babysitter was, in effect, for the benefit of the employer as well as the employee.

The Panel found that the defendant's activities were reasonably incidental to employment. The plaintiff's right of action was taken away. [10 pages]

WCAT Decisions Considered: Decision No. 234/87 (1989), 10 W.C.A.T.R. 64 reld to; Decision No. 714/87 (1987), 6 W.C.A.T.R. 235 reld to; Decisions No. 580/87 reld to, 669/89 reld to, 101/90 reld to, 711/90 reld to
Board Directives and Guidelines: Operational Policy Manual, Document no. 03-01-02

DECISION NO. 349/89R (23/09/91) McCombie M. Cook Nipshagen

Reconsideration (new evidence) - Reconsideration (jurisdiction).

The worker's request for reconsideration of Decision No. 349/89R was dismissed. That decision found no causal relationship between the worker's accident and his right knee disability. A new medical report submitted by the worker gave an opinion on causation, but it did not provide the background facts necessary to substantiate that opinion and to establish a defect in the original decision.

The worker's reconsideration request and the new doctor's report referred to pain in both of the worker's knees. The original Panel only had jurisdiction to deal with the right knee. The reconsideration Panel only considered arguments relating to the right knee. [3 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decision No. 850/87R (1990), 14 W.C.A.T.R. 1 reld to; Decision Nos. 72R reld to, 72R2 reld to 349/89 reld to

DECISION NO. 725/89R (23/09/91) Faubert Drennan Preston

Reconsideration (error of law) - Natural justice (opportunity to make submissions).

The worker requested reconsideration of Decision No. 725/89. In Decision No. 725/89, the hearing panel dismissed the worker's appeal from a decision granting only 50% benefits for temporary partial disability.

The worker submitted that there was a denial of natural justice since the hearing panel relied on a line

of decisions and reasoning which had not been disclosed to the worker and to which the worker did not have an opportunity to respond. The worker argued that the only issue was a narrowly defined issue of whether the worker failed to cooperate with rehabilitation.

The Panel found that the issue on the appeal was the wider issue of entitlement to full benefits for partial disability under s. 40(2)(b). A review of the transcript showed that the reasons relied on by the hearing panel did not raise any issue that had not been pointed out at the hearing. The Panel concluded that there was no violation of the principles of natural justice. In any event, the evidence the worker would have led would not have been sufficient reason for reconsideration. There was evidence to support the hearing panel's conclusion that, in the circumstances, it was reasonable to have expected the worker to have conducted a job search.

The request to reconsider was denied. [11 pages]

WCAT Decisions Considered: Final Decision No. 2 (1987), 4 W.C.A.T.R. 1 reld to; Decision No. 59 (1987), 5 W.C.A.T.R. 17 consd; Decision No. 137 (1987), 4 W.C.A.T.R. 87 reld to; Decision No. 302F (1988), 8 W.C.A.T.R. 30 reld to; Decisions No. 72R2 reld to, 766LR reld to, 725/89 reld to

DECISION NO. 630/90 (23/09/91) McCombie Robillard Seguin

Accident (occurrence) - Credibility.

The employer appealed a decision of the Hearings Officer granting entitlement for a left knee injury that the worker claimed he suffered in an accident at work.

The worker's injury was consistent with his description of the accident, there was a documented visit to a hospital within two days of the injury and there was continuity of complaint. However, there were a number of discrepancies in the worker's evidence, apparently on matters which he considered critical to his claim. He claimed to have visited a hospital on the day of the accident but there were no hospital records to corroborate this. He claimed to have called the employer the next day to report the accident but the Panel found on the evidence that he did not. On balance, the Panel found that the accident did not occur. The appeal was allowed. [8 pages]

Note: A French translation of this decision is also available.

WCAT Decisions Considered: 630/90I reld to

DECISION NO. 955/90 (23/09/91) Moore Klym Preston

Recurrences (compensable injury).

The worker suffered a back injury in January 1978. The worker appealed a decision of the Hearings Officer denying entitlement for a recurrence in November 1983.

The original injury aggravated preexisting asymptomatic degenerative disc disease. On the evidence, the Panel found that the compensable aggravation did not resolve and that the worker continued to experience back symptoms. The appeal was allowed. [8 pages]

DECISION NO. 249/91 (23/09/91) McCombie Shartal Chapman

Hernia (inguinal) - Benefit of the doubt.

The worker suffered a shoulder injury while lifting a bag of mail in September 1986. In January 1987, an inguinal hernia was diagnosed. The worker appealed a decision of the Hearings Officer denying entitlement for the hernia.

The hernia may have been related to a physical fitness programme in which the worker participated. It may also have resulted from innocuous risk factors such as coughing, sneezing and straining. However, it may have occurred at the same time as the shoulder injury or it may have been related to heavy nature of the worker's work when she returned to work during the holiday season in December 1986. Applying the benefit of doubt in favour of the worker, the Panel found that the hernia was compensable.

The appeal was allowed. [5 pages]

DECISION NO. 283/91 (23/09/91) Faubert Shartal Preston

Health care (clothing allowance).

The worker suffered a back injury for which he was receiving a 25% pension. A brace was prescribed for his condition. The worker appealed a decision of the Hearings Officer denying entitlement to a clothing allowance prior to 1988.

The worker did not wear the brace regularly at work. Considering the Board policy for payment of clothing allowances, the Panel considered the worker's situation to be equivalent to a worker who is provided with work garments free of charge, in which case the maximum allowance is 50%. A rough estimate of use of the brace was 4 hours per day, 4 days per week, for which the allowance was 50% of the maximum dollar limit.

The appeal was allowed. The worker was entitled to a clothing allowance of 50% of the maximum. [5 pages]

Ss: 52(3)(b)

Board Directives and Guidelines: Operational Policy Manual, Document no. 06-03-04

DECISION NO. 497/91 (23/09/91) Marafioti M. Cook Meslin

Continuing entitlement.

The worker slipped and fell in June 1989. On the evidence, there was no causal relationship between the accident in June 1989 and a lay-off in July 1989. The worker's appeal from a decision denying benefits in July 1989 was dismissed. [4 pages]

DECISION NO. 559/91 (23/09/91) McCombie M. Cooke Nipshagen

Aggravation (preexisting condition) (osteoarthritis) (hip) - Aggravation (preexisting condition) (progressive condition).

The worker received benefits for an aggravation of a pre-existing osteoarthritic hip condition from

August 1986 to November 1986 and again from September 1988 to February 1989. In February 1989, the worker underwent a total hip replacement operation. The Board denied further benefits on the basis that the acute phase of the worker's disability had ceased by the time of the operation and any ongoing disability was attributable to the underlying non-compensable condition.

The Board relied on the opinion of one of its doctors. He pointed out that since the worker's underlying condition (osteoarthritis) was a progressive condition, it was virtually impossible to speak of the worker returning to his pre-accident state, even after the aggravation had ceased. The condition would have continued to deteriorate regardless of the effects of the accident.

The Panel accepted the premise that one could not expect a progressive underlying condition to return to a pre-aggravation state. However, accepting this premise did not result in a finding of all surgery for the underlying condition being non-compensable. If the aggravation accelerates the progression of the underlying condition, the resulting disability is compensable and Second Injury and Enhancement Fund relief applies.

The appropriate question to be asked in this case was whether the worker would likely have required surgery at approximately the same date had he not suffered the compensable aggravation. Because in this case the compensable aggravation significantly accelerated the need for surgery, the surgery and its sequelae were compensable. [7 pages]

DECISION NO. 677/91I (23/09/91) Bigras Fox Ronson

Adjournment (additional medical evidence).

The appeal was adjourned due to the lack of sufficient medical evidence. After obtaining and reviewing the evidence, the worker could withdraw the appeal, if he wished to do so. [4 pages]

DECISION NO. 322/89R (24/09/91) McIntosh-Janis Lebert Jago

Reconsideration (contentious issue) - Reconsideration (dissent) - Reconsideration (consideration of evidence) - Benefit of the doubt (legal issue) - Procedure (reconsideration) (two-step process).

The worker applied for reconsideration of Decision No. 322/89. In that decision, the worker, who was the captain of a small-town fire department, was denied benefits for stress arising out of his demotion to the rank of first-class fire fighter when the department was merged with that of a larger city. The majority of the original Panel found that the worker's demotion was not an "accident" so as to trigger entitlement to compensation benefits. The Vice-Chair on the original Panel, dissenting, found that the worker had experienced a disablement which arose out of and in the course of his employment.

The only issue before the reconsideration Panel at this point was whether the worker had provided sufficient reasons to warrant involving the employer in the reconsideration process.

The first ground for reconsideration was that the majority should have given more weight to the evidence of the worker's treating psychiatrist. Since the majority found that there was no accident, it did not have to consider the evidence relating to the causal connection between the worker's disability and his work. Questions as to the proper weight to be given to the evidence were thus irrelevant to the majority's

decision. In any event, arguments about the proper weight to be given to evidence are generally insufficient to meet the test for granting a reconsideration request.

The mere existence of a dissent did not constitute sufficient grounds to warrant granting a reconsideration request. The issue of entitlement with respect to claims for disabilities resulting from disciplinary actions is a contentious one. The parties were given an opportunity to make submissions that the Panel considered before giving clear reasons for its conclusions. It is not surprising that, on a contentious issue, the Panel did not reach a unanimous decision.

A third ground dealt with the majority's finding that the worker's demotion was not an "unexpected event" which is one of the definitions of accident described in prior Tribunal decisions. There was evidence to support the original Panel's finding of no "unexpected event".

The original decision embodied a fundamental disagreement between the majority and dissent concerning whether, for the purpose of evaluating claims for stress-related disabilities, a panel should consider the worker's subjective perceptions of the work environment or an objective test. Again, this was a contentious issue and the fact that there were conflicting views adopted by the majority and dissent did not warrant a reconsideration.

The final ground for reconsideration was the original Panel's failure to consider the applicability of the benefit of the doubt principle. This principle applies where the evidence for and against an issue is approximately equal. In this case, there was no major disagreement between the majority and dissent about the evidence and findings of fact. They differed on two fundamental legal points: whether personnel actions can constitute accidents and whether a subjective or objective test should be applied in stress cases. No weighing of the evidence was involved on these points. The benefit of the doubt principle did not apply in this case.

The worker had not provided sufficient reasons to warrant involving the employer in the reconsideration process. The threshold test for granting a reconsideration request had not been met. The application was denied. [9 pages]

Ss: 3(4)

WCAT Decisions Considered: Decision No. 72 (1986), 2 W.C.A.T.R. 28 *reld to*; Decision No. 95R (1989), 11 W.C.A.T.R. 1 *reld to*; Decision No. 42/89 (1989), 12 W.C.A.T.R. 85 *reld to*; Decision Nos. 72R *reld to*, 72R2 *reld to*, 322/89 *reld to*, 322/89I *reld to*

DECISION NO. 802/90 (24/09/91) Newman Shantal Meslin

Withdrawal (of appeal).

The appeal was withdrawn to allow the worker to pursue further issues at the Board. [4 pages]

WCAT Decisions Considered: 802/90L *reld to*

DECISION NO. 830/90 (24/09/91) Bigras Rao Preston*Continuity (of symptoms).*

A production line worker bumped her right elbow in September 1983. She was able to continue working until later in September when she laid off due to an unrelated disability. She returned to work in January 1984. In April 1984, she began to complain of elbow problems, diagnosed as epicondylitis, and laid off in August 1984. The worker appealed a decision of the Appeals Adjudicator denying entitlement for the lay-off in 1984.

There was continuity of symptoms from the time of the 1983 accident. The unrelated lay-off in September 1983 provided remission from the elbow pain. In addition, medication taken for the other disability provided relief for the elbow as well. The Panel found that the condition in 1984 was related to the 1983 injury. The appeal was allowed. [6 pages]

DECISION NO. 975/90 (24/09/91) Sandomirsky Beattie Barbeau*Access to worker file, s. 77 (non-medical information) (social work report) - Access to worker file, s. 77 (harmful information).*

The employer appealed a decision of the Access Specialist denying access to some documents in the worker's file. Some of the documents were found by the Access Specialist not to be relevant and some were found to be harmful to the worker under s. 77(2).

The documents found to be not relevant were a page from a social work report, a direct deposit form and a Vocational Rehabilitation Commutation Report. The Panel found that these documents, including the social work report, were not medical reports. Accordingly, the employer was entitled to access to them, without the worker's opportunity to object under s. 77(5), if they were relevant. The Panel found that the social work report was relevant to the issue in dispute of SIEF but that the other documents were not.

The documents withheld from the worker under s. 77(2) were also relevant to the issue in dispute. To ensure that the worker does not see them, the Panel directed that these documents be released to the employer's representative and be kept in his custody. [6 pages]

WCAT Decisions Considered: Decision No. 1174/87 (1988), 9 W.C.A.T.R. 192 consd; Decision No. 697/90 (1991), 17 W.C.A.T.R. 275 consd; Decision No. 640/90 consd

**DECISION NO. 614/91 (24/09/91) Newman Lebert Howes
MacStocker v. Cipollone***Section 15 application - In the course of employment (proceeding to and from work).*

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken away. The issue was whether the plaintiff was in the course of employment at the time of a motor vehicle accident.

The plaintiff was a self-employed caterer with personal coverage. He operated a catering truck. At the

end of the day, the plaintiff returned to his supplier to return unused supplies and to pick up non-perishable supplies for the next day. He stopped to chat with a friend in a donut shop and was on his way home when the accident occurred.

The Panel found that the plaintiff was not in the course of employment. His right of action was not taken away. [6 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 03-02-03

DECISION NO. 619/91 (24/09/91) McIntosh-Janis Rao Nipshagen

Delay (reporting injury).

The worker received benefits for a left shoulder disability in November 1986. She suffered another bout of left shoulder pain on May 19, 1987. She stopped working and visited her doctor on June 4, 1987 due to her shoulder condition. She did not return to work until August 1987. The worker claimed entitlement for this second period of lost time.

There was no evidence of detailed medical treatment between November 1986 and May 1987, but the employer and co-workers were aware of the worker's continuing shoulder problems. The worker continued to treat herself with the same pain-killers prescribed by her doctor in November 1986 during that period.

At the time of the May 1987 onset of shoulder pain, the worker was not performing her regular duties. She thought that her return to her regular job, upcoming periods of union duties, a vacation day and weekend rest might allow the pain to resolve. This explained the worker's delays in reporting the May 1987 onset of pain, in seeking medical attention and in stopping work.

The worker was entitled to benefits either on the basis of a new accident or a recurrence of the 1986 disability. That issue was left to the Board, should it require determination. [6 pages]

DECISION NO. 637/91 (24/09/91) Signoroni Beattie Chapman

Access to worker file, s. 77 - Freedom of Information (confidentiality provision).

Access to the worker's file was granted to the employer. The worker objected to release of the information on the basis of the Freedom of Information Act. The Panel accepted the reasoning in Decision No. 136/90 and found that s. 77 came within the exception in the Freedom of Information Act for Acts expressly authorizing disclosure and also that s. 77 was not a "confidentiality provision" within the meaning of s. 67(2) of the Freedom of Information Act. [4 pages]

WCAT Decisions Considered: 136/90 apd

Other Statutes Considered: Freedom of Protection and Protection of Privacy Act, 1987, S.O. 1987 c. 25, ss. 21(1)(d), 21(3)(a), 67(2)

DECISION NO. 638/91 (24/09/91) Signoroni Beattie Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 639/91 (24/09/91) Signoroni Beattie Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 672/91 (24/09/91) McIntosh-Janis Lebert Ronson

Three week rule (documents).

The employer sought to introduce documentary evidence that did not comply with the three week rule. The information was relevant but too complex for the Panel to expect the worker to respond to without further time to prepare. The hearing was adjourned. [3 pages]

DECISION NO. 757/90 (25/09/91) Robeson Drennan Apsey

Temporary partial disability - Rehabilitation, vocational (considering self totally disabled) - Availability for employment (job search).

The worker suffered a right shoulder injury in 1980, a low back injury in 1981 and a left shoulder and thoracic spine injury in 1986. The worker appealed a decision of the Hearings Officer granting only 50% temporary partial disability benefits from February 1988 to November 1988.

The Hearings Officer found that the worker was temporarily partially disabled during the period in question by the low back condition related to the 1981 accident. On the evidence, the Panel found that the worker was disabled by the right shoulder, low back, left shoulder and thoracic spine conditions.

The worker was temporarily partially disabled and disqualified from receiving full benefits. He was not justified in considering himself totally disabled. It was reasonable to expect him to have conducted a job search. [19 pages]

WCAT Decisions Considered: Final Decision No. 2 (1987), 4 W.C.A.T.R. 1 *reld* to; Decision No. 471 (1987), 5 W.C.A.T.R. 63 *reld* to

DECISION NO. 141/91 (26/09/91) Hartman B. Cook Clarke

Delay (onset of symptoms).

The worker suffered an elbow injury in December 1984. The worker appealed a decision of the Hearings

Officer denying entitlement for a cervical disability which the worker claimed was related to the same accident.

Considering the medical reports and the delay in onset of cervical symptoms for two years, the Panel found that the worker was not entitled to benefits for the cervical disability. The appeal was dismissed. [8 pages]

DECISION NO. 755/88R2 (27/09/91) Bigras Shartal Chapman

Reconsideration.

The worker's request to reconsider Decisions No. 755/88 and 755/88R was denied. There was no new evidence or argument which would cause the Panel to believe that the previous decisions were not correct. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 *reld to*; Decision No. 850/87R (1990), 14 W.C.A.T.R. 1 *reld to*; Decision No. 755/88 (1988), 10 W.C.A.T.R. 323 *reld to*; Decisions No. 72R *reld to*, 72R2 *reld to*, 755/88R *reld to*

DECISION NO. 624/91 (27/09/91) Faubert Shartal Preston

Access to worker file, s. 77 (employer).

Access to the worker's file was granted to the employer. The fact that the worker was no longer employed by the employer did not affect the employer's right to participate in the process. [3 pages]

DECISION NO. 556/90 (01/10/91) Starkman Beattie Meslin

Jurisdiction, Tribunal (equitable jurisdiction) - Jurisdiction, Tribunal (payments pending appeal) - Detrimental reliance - Estoppel - Discretion, Board (rehabilitation) - Overpayment.

The Board had awarded the worker benefits, pursuant to s. 54 of the Act, to attend a college. This Panel found, in an interim decision, that the worker was not entitled to such benefits, as their payment was based on an exercise of discretion that was inconsistent with the Board's guidelines. The guidelines themselves were found to be consistent with the Act. The Panel then invited further submissions on the issues of the Tribunal's jurisdiction: 1) to direct the Board to continue to pay s. 54 benefits on the grounds that the worker in good faith relied upon the decision of the Board in commencing his program of studies and 2) to direct the Board not to collect overpayments from the worker.

The worker submitted that despite the Board guidelines, the Tribunal retained a residual equitable discretion to apply other guidelines, when determining entitlement to s. 54 benefits, that would mitigate unreasonable harshness in a particular worker's situation.

The Panel accepted the principle that if the Board had been misinterpreting a provision of the Act, the doctrine of estoppel did not apply to bind the Board to continue that misinterpretation. However, that was not the situation in this case. The Board did have a discretion under s. 54 to make expenditures for the purpose of getting the worker back to work, but it erred in applying its own policy. As a result, the worker relied upon the Board's decision authorizing payment to commence his program of studies, to his detriment. It was thus the doctrine of detrimental reliance that the worker would want to rely on.

The Tribunal cannot grant a worker benefits that are not authorized by the Act. Neither equitable principles nor ss. 80(1) and 3(4) give the Tribunal jurisdiction to either decline to apply certain sections

of the Act or to award any benefits not provided for in the Act. As the Panel had found that the worker was not entitled to benefits pursuant to the Board's policy relating to s. 54 benefits, and as it did not have equitable jurisdiction to award benefits without a statutory underpinning, the Panel found that the worker was not entitled to receive rehabilitation benefits to attend the college.

The matter of the recovery by the Board of an overpayment is not simply an administrative issue. It can properly be the subject of an appeal to the Tribunal. In this case the matter of an overpayment did not arise until the Tribunal had made its interim decision. A decision as to whether the overpayment would be recovered had not been made by the Board. However, the Board had made a decision to pay the worker s. 54 benefits and that decision was appealed to the Tribunal. Section 86j(2) gives the Tribunal jurisdiction to deal with amounts so paid, in such manner as it may direct. This gave the Tribunal the power to determine whether the overpayment created by its decision should be recovered.

The worker relied, in good faith, on the decision of the Board to assist him when he decided to attend the college. The worker relied on the representations and actions of the Board to his detriment. It would thus be inequitable and unfair for the Board to collect the overpayment. The Board was directed not to collect any overpayment. [12 pages]

See: 80(1), 86(2)

WCAT Decisions Considered: Decision No. 182 (1988), 10 W.C.A.T.R. 1 *consd*; Decision No. 576/87 (1987), 6 W.C.A.T.R. 163 *consd*; Decision No. 918/87 (1988), 8 W.C.A.T.R. 197 *consd*; Decision No. 296/90 (1990), 14 W.C.A.T.R. 346 *consd*; Decision Nos. 585/87 *consd*, 556/90 *reld to*; 729/90 *consd*; 792/90 *apld*

Board Directives and Guidelines: Operational Policy Manual, Document no. 05-01-09

Cases Considered: S & M Laboratories Ltd. v. Ontario (1979), 24 O.R. (2d) 732, (Ont. C.A.) *consd*; Robertson v. Minister of Pensions [1949] 1 K.B. 227 *reld to*; Falmouth Boat Construction v. Howell [1950] 2 K.B. 16 (C.A.) *reld to*; Lever (Finance) Ltd. v. Westminster Corp. [1970] 3 All E.R. 496 *reld to*; Re Liverpool Taxi Owners' Association [1972] 2 All E.R. 589 *reld to*; Laker Airways Ltd. v. Department of Trade [1977] 2 All E.R. 182 *reld to*; Western Fish Products Ltd. v. Pentwith District Council (1981) 2 All E.R. 204 *reld to*; Rootkin v. Kent County Council '1981' 2 All E.R. 227 *reld to*; Multi-Malls Inc. v. Ontario (Ministry of Transportation and Communications) (1976), 73 D.L.R. (3d) 18, (Ont. C.A.) *reld to*; Irving Oil Ltd. v. R. (1983), 2 Admin. L.R. 53 (F.C.T.D.) *reld to*; York Condominium Corp. No. 228 v. Harbour Square Commercial Inc. (May 6, 1988, unreported) (Davidson, J. Ont. Dist. Ct.) *reld to*; Granger v. Canada (Employment and Immigration Commission) (1986), 29 D.L.R. (4th) 501 (Fed. C.A.) *reld to*

DECISION NO. 8/91 (10/01/91) Sandomirsky Higson Apsey

Medical examination (section 21) - Jurisdiction, Tribunal (federal worker) - Jurisdiction, Tribunal (section 21) - Election (Government Employees Compensation Act) - Words and phrases (claim for compensation, s. 21(1)).

The worker applied for an order to set aside a request by the employer that he attend a medical examination. After the hearing, the employer notified the Tribunal that it had withdrawn its request for the examination. The Panel decided to proceed with a decision on a jurisdictional question but to make no finding on the merits.

The worker was a federal employee. The Government Employees Compensation Act (Can.) incorporates by reference relevant provisions of the Workers' Compensation Act. Section 21 of the Workers' Compensation Act applies to federal employees.

In this case, there was a possible third party action and the worker had to make an election to claim benefits or pursue a court action. The election form was still outstanding. The WCB does not proceed with claims for compensation by federal employees in such circumstances until an election form has been filled out and submitted. Until then, the claim is considered withdrawn. The employer submitted that the worker could not claim the protection of s. 21 since the claim was considered withdrawn and, accordingly, the worker had

not "made a claim for compensation" as required by s. 21.

The Panel found that the worker made a claim for compensation by filing a report of injury and that, therefore, the Tribunal had jurisdiction. There are often cases when additional documents are required before a claim can be adjudicated. The fact that the Board considered the case withdrawn until receipt of the election form did not mean that the worker had not made a claim for compensation. Rather, it merely meant that there would be a delay in adjudication. [10 pages]

Ss: 21(1)

WCAT Decisions Considered: 482/90 consid

Board Directives and Guidelines: Operational Policy Manual, Document no. 02-03-04

Other Statutes Considered: Government Employees Compensation Act, R.S.C. 1985 c. G-5, ss. 4, 9(1), 11

Cases Considered: C. Corp. v. K.(D.), (Ont. Div. Ct.) (November 29, 1990) *reld to*

DECISION NO. 934/90 (01/10/91) Onen Robillard Preston
Cross v. Jakielaszek

Section 15 application - Worker (test) - Casual employment - Independent operator (newspaper distributor) - Delay (section 15 application).

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken away.

The plaintiff was delivering newspapers to various retail outlets at the time of a motor vehicle accident. He had full time employment with a different employer. He did the delivery job on Sunday mornings. He was paid in cash on completion of his route. No deductions were made. He was one of a roster of "Sunday drivers". These drivers were considered too casual by the employer to merit the usual administrative record keeping required by the employment contract of regular drivers. The plaintiff drove the employer's truck and could only deliver the papers provided to him. He had no business relationship with the outlets to which he delivered. The Panel concluded that the plaintiff was a worker. Further, his employment could not be considered casual. He was regularly employed each Sunday and his work was for the purposes of the employer's industry.

The defendant driver was the son of the president of the defendant company. On the evidence, the son was not an executive officer or director of the company. Rather, he was a worker. Further, his employment was not casual. He was working for the company for two or three months. Considering the duration and regularity of the employment, it could not be considered casual.

The civil action was commenced in 1986. However, there was no limitation period for applications under s. 15.

The plaintiff's right of action was taken away. [14 pages]

WCAT Decisions Considered: Decision No. 226/89 (1989), 11 W.C.A.T.R. 307 *reld to*

Cases Considered: *Montreal v. Montreal Locomotive Works Ltd.*, [1948] 1 D.L.R. 161 (P.C.) *reld to*

DECISION NO. 967/90 (01/10/91) Faubert Drennan Jago

Permanent disability - Pensions (assessment) (eye).

The worker suffered an eye injury, which required surgery to remove a splinter. His vision was normal but the worker claimed to suffer from occasional blurry vision as well as irritation and watering of the eye. The worker appealed a decision of the Hearings Officer denying entitlement to a pension.

The Panel accepted medical evidence that a healed corneal scar can result in splitting of light at the edge of the pupil when the pupil is semi-dilated, causing some degree of blurring and irritation. The Panel found that the worker had a permanent disability. Considering the Rating Schedule provisions of no pension for 20/30 visual acuity and 1% for 20/40, the Panel found that the worker was entitled to a 1% pension. The impairment was quite minimal and could not be considered greater than that which would result from 20/40 vision.

The appeal was allowed. [7 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 05-03-03

DECISION NO. 436/91 (1/10/91) McGrath M. Cook Jago

Subsequent incidents (outside work) - Aggravation (preexisting condition) (facet joint syndrome).

The worker suffered mid and low back strains at work in 1979, 1981 and March 1986. In September 1986 he injured his back while helping a friend move. The worker was off work until February 1988. The worker submitted that he had suffered all along from facet joint syndrome and that the moving incident was just an exacerbation of this condition.

Assuming that the worker did have a facet joint syndrome condition, the worker would only be entitled to benefits if that condition were compensable in the first place. The worker's back problems did not begin with the 1979 work accident. He had been on pain medication and engaging in chiropractic treatment since 1976. There was no evidence that anything related to his work caused the facet joint syndrome.

The Panel found that the three periods of compensation for the worker's back were in reality aggravations of his preexisting chronic back condition. None of these work episodes caused the worker's back disability. The moving incident was not an exacerbation of a compensable condition. The worker was not entitled to further benefits. [5 pages]

DECISION NO. 533/91L (1/10/91) Robeson Lebert Nipshagen

Leave to appeal (substantial new evidence).

The worker sustained a fractured ankle in a compensable accident in October 1977. Temporary benefits were paid for various periods up to December 1979. The worker was awarded a 5% pension for the ankle injury. A 1983 Appeal Board decision denied the worker: benefits for a psychotraumatic disability, benefits for a low back disability, continuing temporary benefits after December 1979 and an increase in the 5% award.

Leave to appeal was granted only on the question of entitlement for a psychotraumatic disability. A social work report and a report by a Board psychiatrist constituted substantial new evidence on that issue. Both were prepared in 1988 at the request of the Board. The absence of such evidence had been raised by the worker's representative before the Appeal Board and also was later noted in a Board memo. The new psychiatric report offered a different opinion as to the significance of the original findings.

There was no new evidence with respect to the other three issues. [7 pages]

WCAT Decisions Considered: Decision No. 64 (1986), 2 W.C.A.T.R. 19 reld to

DECISION NO. 645/91 (1/10/91) Onen Drennan Meslin

Exposure (chemicals) - Causation (medical evidence) (standard of proof) - Sarcoidosis.

The worker appealed the denial of his claim for a lung condition diagnosed as sarcoidosis. The worker was a caretaker who used a cleaner, Spiral 18. The Hearings Officer found that there was no evidence to show a relationship between exposure to chemicals and development of the disease.

Though the etiology of sarcoidosis is unknown, there was other evidence available to the Panel concerning causation. The worker had no history of lung symptoms prior to his four-year exposure to this cleaner which is known to irritate the respiratory tract. Once the worker was removed from contact with the cleaner, his symptoms slowly cleared and he was able to return to work that did not involve contact with chemicals. The worker generally used the cleaner in concentrations exceeding those recommended by the manufacturer.

This evidence pointed to a connection between the cleaner and the condition. No different theory of causation was found. The worker's sarcoidosis was compensable. It was not clear whether the worker's disease was rendered symptomatic by exposure to Spiral 18, or whether the cleaner caused the disease itself. In any event, the worker did not have any prior symptoms, so that the Panel was satisfied that his total lung disability was caused by exposure and was therefore compensable. [11 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-13-01

DECISION NO. 364/89R (02/10/91) Marafioti Lebert Jago

Reconsideration.

The worker's request to reconsider Decision No. 364/89 was denied. [3 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decision No. 850/87R (1990), 14 W.C.A.T.R. 1 reld to; Decisions No. 72R reld to, 72R2 reld to, 364/89 reld to

DECISION NO. 24/91 (02/10/91) Moore McCombie Chapman
Hamilton General Civic Hospital v. Jacobs

Section 15 application (remoteness) - Section 15 application (negligent treatment) - Intervening causes (treatment) - Consequences of injury - Election (notice) - Subrogation - In the course of employment (contemporaneity).

The defendants in a civil action applied to determine whether the plaintiff's right of action was taken away. The plaintiff was injured at work. He received treatment at the defendant hospital and was diagnosed as having a sprained heel. Two months later, he was diagnosed as having a fracture of the heel bone. The plaintiff brought an action against the hospital and the defendant doctor, alleging negligence.

The plaintiff submitted that the injury for which damages were being claimed was not the result of an employment accident but, rather, the result of negligent medical treatment.

The Panel found that the events at the hospital were not so far removed from the worker's initial injury that it could be said that they were not a reasonably foreseeable consequence of the original accident. The medical treatment provided to the worker and the alleged negligence (misreading an x-ray) were entirely

foreseeable. (In the Panel's view, where entitlement to workers' compensation benefits is in issue, any negligent treatment is probably foreseeable. However, it was not necessary to make this conclusion.) Therefore, the alleged negligence was not an intervening cause. Since the injury for which damages were claimed arose out of and in the course of employment, it was an injury for which benefits are payable under the Act. This brought the injury within the scope of s. 8(1) and (9).

The right of action and the right to claim benefits are not mutually exclusive. Rather, they coexist. The effect of an election is only to determine whether the Board or the worker will control the right of action. The plaintiff did not make a formal election in this case. He received workers' compensation benefits and later commenced the action. The Panel found that an election occurred when he applied for workers' compensation benefits. Once the Board paid benefits, it had subrogated rights over the action.

Although the plaintiff did not become aware of the cause of action against the defendants until several months after the original injury, his election gave the Board the subrogated rights over any present or future right of action for damages arising from the injury.

Since the defendant doctor was not a Schedule 1 employer or a worker of a defendant hospital, she was not protected from suit by s. 8(9). The right of action against her was not taken away.

Section 8(9) provides that there is no right of action where the workers of both employers are in the course of employment at the time of the happening of the injury. The Panel found that the plaintiff was not in the course of employment at the time of the happening of the injury. The injury in question was the injury resulting from misreading of the x-ray. The worker was entitled to benefits for any disability resulting from the compensable accident. This included disability attributable to negligence of the defendants. However, subsequent third party negligence may, in certain circumstances, constitute a distinct injury, giving rise to a right of action. That right of action will be taken away if all the conditions in s. 8(9) are met. In this case, the plaintiff was in hospital receiving treatment at the time of the injury. He was not in the course of employment. Therefore, the right of action against the hospital was not taken away.

The plaintiff's right of action was not taken away. It was up to the Board to decide whether to maintain the action. The Panel did not have jurisdiction regarding the action of the plaintiff's wife since she was not a dependant within the meaning of the Act. [17 pages]

See: 8(1), 8(9)

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 *consd*; Decision No. 263/88 (1989), 10 W.C.A.T.R. 152 *consd*; Decision No. 295/90 *consd*

Board Directives and Guidelines: Operational Policy Manual, Document no. 02-03-04

Cases Considered: Hogan v. Bentinck West Hartley Collieries (Owners) Ltd., [1949] 1 All E.R. 588 (H.L.) *consd*; Katzman v. Yaeck (1982), 37 O.R. (2d) 500 (C.A.) *consd*; McIver v. Tammi (1921), 62 D.L.R. 534 (Ont. C.A.) *consd*; McIntosh v. Gzowski (1979), 105 D.L.R. (3d) 721 (Ont. C.A.) *consd*; Price v. Milawski (1977), 18 O.R. (2d) 113 (C.A.) *consd*

DECISION NO. 71/91R (02/10/91) McCombie Beattie Seguin

Reconsideration.

The worker's request to reconsider Decision No. 71/91, was denied. [3 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 *reld to*; Decision No. 850/87R (1990), 14 W.C.A.T.R. 1 *reld to*; Decisions No. 72R *reld to*, 72R2 *reld to*, 71/91 *reld to*

DECISION NO. 303/91 (02/10/91) Hartman Robillard Nipshagen

Delay (onset of symptoms).

The worker suffered a low back injury in a fall in May 1972. The worker appealed denial of benefits in 1976 for a right shoulder disability and for low back disability. Considering the passage of time, the Panel preferred evidence from closer to the time of the events. The Panel concluded that the shoulder and back pain in 1976 was not related to the 1972 accident. The appeal was dismissed. [6 pages]

DECISION NO. 386/91 (02/10/91) Chapnik B. Cook Apsey

Temporary disability (beyond pension level) - Pensions (assessment) (back) - Pensions (assessment) (whole person concept).

The worker suffered a low back injury in 1984. The worker appealed a decision of the Hearings Officer denying an increase in the worker's 10% pension and denying temporary benefits for a period in 1989.

The Panel had jurisdiction to consider non-organic disability, although there had not been a final decision of the Board on that issue. Accordingly, the Panel considered the level of the worker's pension using the whole person concept.

The worker's disability was a mixture of organic and non-organic conditions. On the evidence, the pain was predominantly organic. Therefore, the adequacy of the pension should be considered using the organic disability rating schedule but with recognition of the whole pain disability. The Panel concluded that the 10% rating correctly measured the worker's residual disability, including the non-organic factor in his condition.

There was insufficient evidence to establish that the worker was temporarily disabled beyond his pension level in 1989.

The appeal was dismissed. [8 pages]

WCAT Decisions Considered: Decision No. 206A (1988), 9 W.C.A.T.R. 4 reld to; Pension Assessment Appeals Leading Case Interim Report (1986), 7 W.C.A.T.R. 365 reld to; Decisions No. 510/87R reld to, 487/89I reld to

DECISION NO. 456/91 (02/10/91) McGrath Ferrari Apsey

Disablement (strenuous work) - Disc, herniated.

The worker appealed a decision of the Hearings Officer denying entitlement for a herniated disc. The Panel found that the nature of the worker's job was a significant contributing factor to development of the herniated disc. The heavy lifting, bending and twisting that was required in the worker's job caused his seriously degenerated disc to rupture. The appeal was allowed. [7 pages]

DECISION NO. 532/91 (02/10/91) Marafioti Robillard Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 534/91 (02/10/91) Marafioti Robillard Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 612/91 (02/10/91) Faubert Beattie Preston

Delay (reporting injury).

The worker appealed a decision of the Hearings Officer denying entitlement for a shoulder injury. The worker claimed that he suffered the injury in December 1988. The Panel found that the worker suffered the injury as he described, that he mentioned it to his lead hand but asked him not to report it out of concern for his job, and that he reported the injury in January 1989 after the pain became worse. The worker reported the injury about the time he had a dispute about his employment. However, the Panel was satisfied that the accident occurred. The appeal was allowed. [6 pages]

DECISION NO. 660/91I (02/10/91) McCombie Shartal Chapman

Adjournment (additional evidence).

The worker was receiving a provisional pension for non-organic disability. He was appealing denial of a pension for organic disability. The Panel wanted to proceed using the whole person approach. As a Board reassessment of the non-organic disability was imminent, the hearing was adjourned. [4 pages]

DECISION NO. 671/91L (02/10/91) Chapnik M. Cook Meslin

Leave to appeal (good reason to doubt correctness) (consideration of evidence).

The worker applied for leave to appeal a decision of the Appeal Board denying entitlement for a shoulder condition. There was good reason to doubt the correctness of the Appeal Board conclusion. The Appeal Board relied on the opinions of the employer's doctor and a Board consultant who had not examined the worker without mentioning supportive reports from a number of treating doctors.

Leave to appeal was granted. [4 pages]

DECISION NO. 856/90 (3/10/91) Onen Robillard Nipshagen

Withdrawal (of appeal).

In a preliminary decision, the Panel had decided that the issues in dispute on this appeal included entitlement for possible chronic pain disability. One week before the appeal was scheduled to proceed, the worker, with the consent of the employer, requested that the appeal be withdrawn to allow him to return to the Board with the issue of chronic pain entitlement.

Normally, the Panel would not allow the withdrawal of the appeal after the commencement of the hearing, but in this case there were compelling reasons for doing so. The Board reviewed the worker's file for chronic pain entitlement without the worker's knowledge. The worker was advised of the Board's negative decision concerning such entitlement after his appeal had been brought to the Tribunal. Both parties were taken by surprise by the actions of the Board. The worker's representative was not prepared to deal with the question of chronic pain entitlement at the commencement of the Tribunal hearing because it had not been placed in issue directly either in the Case Description or in the worker's original appeal.

Given the surprise of the Board ruling, it was reasonable to allow the withdrawal without prejudice. [3 pages]

WCAT Decisions Considered: Decision No. 856/901 reld to

DECISION NO. 277/91 (03/10/91) McIntosh-Janis Lebert Shuel

Assessment of employers (retroactivity) - Assessment of employers (casual workers) - Board Directives and Guidelines (assessment of employers) (retroactivity) - Estoppel (representation or conduct) - Detrimental reliance.

The Board auditor found that wages paid to the employer's casual help in 1986, 1987 and 1988 had not been reported to the Board, nor were wages reported that had been paid to family members in 1988. The Board retroactively assessed the employer on these unreported earnings for 1987 and 1988. The employer was not assessed for 1986 pursuant to the Board's policy to adjust retroactively only for two years, where there had been an incorrect assessment without fraud or deliberate misrepresentation by the employer. The employer sought full relief from the retroactive aspect of the assessment under s. 100(2).

The employer's WCB forms were completed by its accountants and they were not reviewed by the employer. The employer had never reported wages paid to casual employees who were paid without any tax deductions. Payroll information supplied to the Board was based on T-4 forms issued to employees. A Guide that the Board sent to employers, each year, stated that wages paid to persons employed on a part-time or casual basis were included in assessable earnings and a line on the form itself referred to "other earnings not on T-4".

The Panel accepted that there were no intentional inaccuracies or deliberate misrepresentations. The employer's choice, to delegate to its accountants review of the Board's clear instructions on the proper completion of the forms, did not give it a greater right to relief from paying the proper assessments than would otherwise be the case. There were no circumstances to justify interference with the Board's application of its general policy concerning retroactive assessments. That policy was compatible with s. 100(2) of the Act.

In 1982 the Board had performed an audit, but no mention was made at that time of any problems with the employer's accounts. The employer raised the doctrine of estoppel by representation or conduct, submitting that it had relied to its detriment on the Board's failure to say anything, following the prior audit, about the employer's payroll treatment of its casual employees.

The Panel had doubts as to the applicability of the doctrine of estoppel where a statutory provision, enacted for the benefit of the public, imposed positive duties on the Board to collect assessments and on the employer to report and pay. The Panel did not have to decide this issue.

Even if the doctrine of estoppel by representation or conduct could be raised against the Board, there was no representation in this case to support it. The Board's silence or failure to note the employer's error earlier could not reasonably be considered such a representation. There was no clear and unambiguous statement by the Board that the employer was relieved from the obligation to include casual employees in its payroll report. The Board continued to advise the employer, in each annual package of materials accompanying the payroll form, that casual employees were to be included.

The employer's appeal, from the decision that it was to pay retroactive assessments on the adjusted payroll amounts, was dismissed. [11 pages]

Ss: 100(2)

WCAT Decisions Considered: Decision No. 585/87 distd

Board Directives and Guidelines: Operational Policy Manual, Document nos. 08-04-08, 08-08-02

Cases Considered: Maritime Electric Co. v. General Dairies Ltd., [1937] 1 D.L.R. 609 (J.C.P.C.) consd; Thrasyvoulou v. Secretary of State for the Environment (1989), 109 N.R. 197 reld to; Re McDonough (1977), 7 A.R. 412 reld to; Laker Airways Ltd. v. Department of Trade, [1977] 1 Q.B. 643 (C.A.) consd; Irving Oil Ltd. v. R. (1983), 2 Admin. L.R. 53 (F.C.T.D.) reld to; Central London Property Trust Ltd. v. High Trees House Ltd., [1947] 1 K.B. 130 reld to; Guerin v. R. (1984), 13 D.L.R. (4th) 321 reld to

DECISION NO. 593/91 (03/10/91) Faubert Lebert Shuel

Continuing entitlement.

The worker suffered multiple injuries in a fall in April 1978 and received benefits until January 1980. The worker appealed a decision of the Hearings Officer denying benefits for a low back disability subsequent to August 1981.

The worker has treated herself since the accident. She hangs from the ceiling, applies ice and does exercises. She was unable to sit. At the hearing, she remained in a kneeling position. She has not worked since 1984. When working prior to 1984, she either stood or spread her work out on the floor.

The worker's doctors, including three orthopaedic surgeons, could not determine a cause for the worker's complaints. Chiropractors gave varying diagnoses, but the Panel could not give them significant weight since these opinions were not supported by the evidence of the specialists. The level of the worker's activity was not consistent with her stated disability. Her exercise regime required a significant degree of fitness and agility which was inexplicable in comparison to her complaints.

The appeal was dismissed. The Panel made no findings regarding non-organic disability. [9 pages]

DECISION NO. 622/91 (03/10/91) Faubert Shartal Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 623/91 (03/10/91) Faubert Shartal Preston

Access to worker file, s. 77 (issue in dispute) (pension assessment).

The employer appealed a decision of the Decision Review Coordinator denying access to the worker's file. The Claims Adjudicator had confirmed a decision denying further temporary benefits. The Adjudicator also advised the worker that the Board would be reviewing his claim to determine whether he was entitled to a pension assessment. The employer requested access regarding the issue in dispute of entitlement to a pension assessment. The Board denied access on the grounds that there was no issue in dispute.

The Board's initial investigative process is intended to be expeditious and fair. It would impair this process if parties had the option of obtaining information at any stage, no matter how preliminary, to try to

prevent an unfavourable adjudication from taking place.

The Board's intention to review the file to determine whether the worker was entitled to a pension assessment could not be considered a decision. Rather, it was part of the information gathering process which precedes decision making in pension matters.

Since there was no issue in dispute, the employer was not entitled to access. The appeal was dismissed. [5 pages]

WCAT Decisions Considered: 640/90 apid

Board Directives and Guidelines: Operational Policy Manual, Document no. 01-14-11

DECISION NO. 674/91 (03/10/91) B. Cook Drennan Shuel

Continuity (of treatment).

The worker suffered an ankle injury in June 1978 and returned to work after four days. The worker was off work for periods subsequent to 1988 due to ankle pain. The employer appealed a decision of the Hearings Officer granting entitlement for continuing ankle disability.

There was a lack of continuity of treatment from 1978 to about 1985 but there was continuity of complaint to co-workers. Medical specialists could not find an organic problem which could explain the worker's level of disability. However, a number of doctors did seem to agree that the worker did have a physical disability which was related to the original accident and possibly to the repetitive nature of her work as well.

On the balance of probabilities, the Panel found that the worker's continuing disability was related to the 1978 accident. The appeal was dismissed. [8 pages]

DECISION NO. 651/90R (10/10/91) Moore Jackson Apsey

Reconsideration.

The worker's request to reconsider Decision No. 651/90 was denied. There was no evidence to support the worker's contention that the hearing panel was biased against him. A review of the transcript showed that the panel was extremely patient in the face of the worker's evasiveness and antagonism. [9 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decisions No. 72R reld to, 72R2 reld to, 651/90 reld to

DECISION NO. 482/91 (10/10/91) Newman Jackson Meslin

Apportionment (industrial disease).

The worker was a pipefitter from 1957 to 1988. He died from mesothelioma related to asbestos exposure at work. The Board charged the costs of the claim to the last employer. The employer appealed a decision of the Hearings Officer refusing to remove the costs of the claim from its file.

The worker started working for the last employer in 1978. There was evidence that mesothelioma usually

appears 30 years or more after onset of exposure. There was also evidence that use of asbestos declined in the mid 1970s.

The Panel agreed with Decision No. 398/89 and found that pursuant to s. 122(8), the costs of the claim should be assessed against the entire class and not against an individual employer. The appeal was allowed. [5 pages]

Ss: 122(8)

WCAT Decisions Considered: Decision No. 398/89 (1990), 13 W.C.A.T.R. 195 apld; Decision No. 359/87 consid

DECISION NO. 615/91 (10/10/91) Faubert Felice Barbeau

Supplements, temporary - Board Directives and Guidelines (supplements, temporary) (policy change) - Significantly greater than is usual - Rehabilitation, vocational (cooperation).

The worker suffered injuries in 1975 and 1984 for which he was awarded pensions totalling 20%. He received supplements from 1986 to July 1988. The worker appealed a decision of the Hearings Officer denying a supplement subsequent to July 1988.

Board policy regarding temporary supplements changed in November 1987. Prior to that time, the determination of whether impairment of earning capacity was significantly greater than usual was based on ability to perform pre-accident work or work with comparable income. After November 1987, it was based on the difference between pre-accident earning capacity and estimated post-accident earning potential.

It appeared that the Board applied the November 1987 policy and found that, considering deemed earnings, the worker's impairment of earning capacity was not significantly greater than usual. The Panel disagreed with this approach. Correspondence between the Board and the Office of the Worker Adviser stated that the new policy applied only to workers who were awarded supplements after November 1987 and that the old policy would continue to apply to workers who were already receiving supplements. In any event, the Panel found that, considering the wage loss, the worker's disability, age, education, ability to communicate and work experience, the worker's impairment of earning capacity was significantly greater than usual.

The Panel was satisfied that the worker cooperated with rehabilitation. A more aggressive approach by the rehabilitation counsellors was needed but the worker made some efforts to find employment.

The appeal was allowed. [9 pages]

WCAT Decisions Considered: 191/91 rald to

Board Directives and Guidelines: Policy of Supplementary Benefits under s. 45(5) of the Act, Board Minute 1(a), November 16, 1987, p. 52

DECISION NO. 344/89 (11/10/91) Kenny Drennan Meslin

Medical opinion (heart attack) (thrombosis) - Medical opinion (heart attack) (stress) - Heart attack - Presumptions (section 3).

The employer appealed the worker's entitlement to benefits for a heart attack. The worker was a police staff sergeant. He experienced the attack during a lengthy telephone conversation with a member of the public. He claimed that it was a particularly stressful call because it involved child custody so that he was worried about the child's safety, but there was little the police could do about it.

The worker's heart attack was a sudden and unexpected occurrence and as such qualified as an injury by

accident under the Act, even if it was not associated with any unexpected external cause. As the accident occurred in the course of employment, the s. 3(3) presumption applied. For that presumption to be rebutted there must be clear and convincing evidence that it was probable that the worker's work environment was not a significant cause of his heart attack.

There was evidence that the worker experienced symptoms of coronary artery disease before the day of the heart attack. The medical evidence indicated that the worker's heart attack was caused by thrombosis and that it is unlikely that emotional stress causes thrombosis. Further, in the relatively rare situations in which emotional stress can precipitate a heart attack, they require a very substantial degree of stress.

Objectively, one would expect that, as this worker had handled the type of telephone call in question on a regular basis for a number of years, he would not have found it extremely stressful. Even the worker's subjective reactions indicated that the call, though frustrating and somewhat stressful, was not acutely stressful. The worker did not do any follow-up on the call, which would indicate that he did not believe the child was in serious danger, and he did not refer to the telephone call as being stressful until five months after the heart attack. The stress was not of the intensity required to cause a non-thrombotic heart attack by spasm.

The Panel was satisfied that it had been shown, by clear and convincing evidence, that the worker's work was not a significant cause of his heart attack. The appeal was allowed. [21 pages]

WCAT Decisions Considered: Decision No. 24F (1990), 13 W.C.A.T.R. 1 reld to; Decision No. 17/88 (1990), 17 W.C.A.T.R. 1 consd; Decision No. 42/89 (1989), 12 W.C.A.T.R. 85 consd; Decision No. 240/89 (1990), 16 W.C.A.T.R. 113 reld to; Decision No. 224/90 (1990), 14 W.C.A.T.R. 310 reld to; Decision No. 544/89 reld to

DECISION NO. 795/90L (11/10/91) Kenny Higson Preston

Leave to appeal (good reason to doubt correctness) (consideration of issue) - Leave to appeal (substantial new evidence) (medical report) - Presumptions (section 3) (applicability) - Presumptions (section 3) (standard of proof) - Accident (definition of).

The worker sought leave to appeal a decision of the Appeal Board that denied him benefits for a non-fatal heart attack that occurred while he was performing maintenance work on a mine shaft.

The worker had underlying narrowing of the arteries which was the main cause of his heart attack. It had developed over many years and was not related to the worker's employment. The medical evidence indicated that, if the worker had been exposed to carbon monoxide fumes, it was possible that the work might have precipitated a heart attack because the underlying condition had reached a critical level.

A new medical report reiterating the carbon monoxide fume theory was not substantial new evidence such as to warrant granting leave to appeal. That theory had been raised before the Appeal Board, but was rejected because Board investigations indicated that there was not an excessive presence of carbon monoxide in the area of the accident. There was no new evidence as to the actual level of carbon monoxide exposure.

The worker argued that there was good reason to doubt the correctness of the Appeal Board's decision since it had failed to apply the presumption in s. 3(3).

As the worker's heart attack was sudden and unexpected, he had suffered an accident for the purposes of the Act. It was not necessary to show that his injury was connected to any unexpected external cause, such as unusual work, for there to be an accident. As the accident occurred in the course of employment, the presumption applied.

The presumption is important because it changes the question to be asked by the decision-maker. Instead of asking whether the worker's heart attack arose out of his employment the question becomes, "Has it been

shown that this worker's heart attack did not arise out of his employment".

The presumption's application is not limited to cases where the circumstances of the accident are unknowable (such as a fatal accident to a worker who was alone). It applies in all cases where the accident occurred in the course of employment. If the evidence against a work relationship is sufficiently clear and convincing to show that the work was not a significant cause of the injury, it did not arise out of the employment and there is no right to compensation.

By failing to apply the presumption, the Appeal Board asked the wrong question. However, for there to be good reason to doubt the correctness of the Appeal Board's decision, it is not sufficient that a legal test has been misstated. If the Appeal Board reached the correct decision on the evidence before it (i.e. it was unlikely that a Tribunal Panel would reach a different decision) leave should not be granted.

The medical evidence suggested that work was unlikely to have been a cause of the heart attack in the absence of carbon monoxide exposure. The Board had investigated that possibility and the evidence suggested no problem with air quality. There was convincing evidence that the work environment was not a significant cause of the accident. There was no good reason to doubt the correctness of the Appeal Board's decision.

Leave to appeal was denied. [14 pages]

Ss: 3(3)

WCAT Decisions Considered: Decision No. 42/89 (1989), 12 W.C.A.T.R. 85 apld

Cases Considered: Beckon v. Ontario (Deputy Chief Coroner) (1990), 70 D.L.R. (4th) 136 (Ont. Div. Ct.) distd

DECISION NO. 49/91 (15/10/91) Moore Higson Nipshagen

Suitable employment - Rehabilitation, vocational (program not offered by Board) - Availability for employment (job search).

A heavy equipment operator suffered a back injury in September 1971 and a knee injury in August 1984. After discharge from HRC to modified work in September 1985, he refused work as a grader operator. The worker appealed a decision of the Hearings Officer denying temporary benefits subsequent to September 1985.

On the evidence, the worker was temporarily partially disabled during the period in question and the work as a grader operator was not suitable. However, the worker made no efforts to find other work. The Board did not offer a rehabilitation program but the worker did not conduct himself in a manner consistent with the requirements of s. 41(1)(b)(i) of the pre-1985 Act.

The worker was entitled to temporary benefits at the 50% rate. The appeal was allowed in part. [12 pages]

WCAT Decisions Considered: Decision No. 548/87 (1987), 5 W.C.A.T.R. 176 apld

DECISION NO. 627/91 (15/10/91) Sandomirsky Shartal Jago

Second Injury and Enhancement Fund (prolonged disability).

The employer appealed a decision of the Hearings Officer denying SIEF relief. The worker suffered a minor cervical strain and was off work for close to 12 months. On the evidence, the worker had a preexisting condition consisting of a loss of cervical lordosis forming a mild kypholordotic curvature as well as minor osteophyte formation.

The Board denied SIEF relief, finding that the preexisting condition was minimal and that it did not prolong the period of disability. The Panel disagreed and found that the minor preexisting condition enhanced the compensable condition.

The appeal was allowed. The employer was entitled to 50% SIEF relief. [5 pages]

Board Directives and Guidelines: Claims Services Division Manual, s. 108(2), p. 235, Directive 1

DECISION NO. 647/91 (15/10/91) Chapnik Lebert Preston
Donway Ford Sales Ltd. v. Ilias

Section 15 application - In the course of employment (employment relationship) - Worker (contract of service) (employment relationship) - Worker (contract of service) (family member).

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken away. The issue was whether the plaintiff was a worker in the course of employment at the time of a motor vehicle accident.

The plaintiff's father was a delivery driver. On the day of the accident, the father called the plaintiff and asked him to do a delivery since he was not feeling well. The plaintiff went to his father's employer, took a van and made the delivery with the permission and consent of the employer. The employer paid the father for the delivery. The plaintiff had made the delivery for his father about 10 or 15 times previously. Sometimes his father paid him \$20 but this was not expected.

The Panel found that the plaintiff was not a worker of either his father or his father's employer. There was no payment by the company to the plaintiff. The payment from the father was more in the nature of a gratuitous allowance than payment for services rendered. The plaintiff was employed by a different employer and made deliveries for his father on a very irregular basis. There was no intention to create an enforceable contract.

The plaintiff's right of action was not taken away. [10 pages]

WCAT Decisions Considered: 577 consd, 1054/87 consd, 146/89 distd, 493/90 distd

DECISION NO. 657/91 (15/10/91) Sandomirsky Fox Apsey

Investigation by Tribunal (pre-hearing) - Medical examination (section 86h) - Continuing entitlement.

The worker was employed as a pro-manager and greens keeper at a golf club, when he injured his back in July 1987. He sought ongoing benefits after April 1989.

The Panel found that, though the worker may have continued to have residual back problems, they were only periodic and did not preclude him from returning to work. The worker was not entitled to further benefits as his disability did not continue after April 1989.

In a preliminary matter, the Panel refused the worker's request for a pre-hearing medical assessment of the worker under s. 86h(4). That section does not allow for a medical assessment simply on the request of a party. It gives the Tribunal the discretion to obtain medical assistance that will better enable a panel to determine a question of fact in an appeal. It was the worker's representative's responsibility to obtain further evidence if there was insufficient evidence on file. While the compensation system is non-adversarial, and the Board and Tribunal both have investigative powers, it is always in a party's best

interests to present complete and persuasive evidence.

The worker was given the option to withdraw the appeal to obtain further medical evidence, but he chose to proceed, leaving it to the Panel to determine if further evidence was necessary to decide the appeal, following the hearing. [6 pages]

Ss: 86h(4)

DECISION NO. 687/91 (15/10/91) McCombie Higson Preston

Accident (occurrence) - Credibility.

The employer appealed a decision of the Hearings Officer granting entitlement. The worker claimed he suffered injuries in a fall in November 1988. A co-worker who provided supportive evidence was not credible.

The foreman who testified for the employer was also not credible. However, the worker was credible. He testified in a straightforward manner and answered concerns and questions put to him. There were some concerns about his reporting of the injury but these were minor. The medical findings were compatible with the accident as described.

The appeal was dismissed. [9 pages]

DECISION NO. 698/91I (15/10/91) McCombie Drennan Ronson

Adjournment (additional evidence).

The worker was appealing denial of entitlement for an eye injury which he related to exposure at work. The worker wanted to bring a witness. However, the worker had not complied with the requirement of providing the name of the witness and a summary of the witness' evidence three weeks prior to the hearing. There had been a Labour Relations Board hearing regarding a work refusal by the worker under provisions of the Occupational Health and Safety Act. There was an application for judicial review regarding that hearing. In addition, there had been a parallel court proceeding on the same issue as the OLRB hearing. As well, the employer had a medical report it wanted to introduce that did not comply with the three week rule.

In the circumstances, the Panel adjourned the hearing. The Panel did not think that the results of the court proceedings would be of much relevance but made no ruling at this point. The parties could introduce the evidence they wanted as long as they complied with the three week rule before the next hearing date. [5 pages]

Other Statutes Considered: Occupational Health and Safety Act, R.S.O. 1980 c. 321, ss. 23, 24

DECISION NO. 711/91I (15/10/91) McIntosh-Janis M. Cook Meslin
Canada Dry Bottling Co. v. Grubisic

Procedure (absent parties).

The hearing of a s. 15 application was adjourned as the plaintiff had been in a motor vehicle accident on the morning of the hearing and was in the hospital receiving treatment. [5 pages]

DECISION NO. 134/8912 (16/10/91) Moore Fox Sutherland

Cancer (lung) - Exposure (asbestos) - Exposure (bischloromethylether) - Exposure (polycyclic aromatic hydrocarbons) - Parties (representation) (addition of representative) - Intervenors.

The worker's widow appealed a decision denying benefits for the death of her husband from lung cancer. The worker was employed from 1964 to 1980 in a wire manufacturing plant. Most of the wire had to be covered or insulated. The worker was exposed to a variety of substances. He was also a cigarette smoker.

In this interim decision, the Panel set out its findings regarding the nature and extent of the exposure to provide a foundation for the medical expert witnesses who still had to testify concerning the effects of the agents to which the worker was exposed.

After setting out the worker's work history, the Panel made findings regarding exposure, as follows:

1) Asbestos - The worker was exposed to chrysotile asbestos, which is widely accepted as a carcinogen. His total cumulative exposure was marginally above the safe level of lifetime exposure set by the Royal Commission on Asbestos.

2) Bischloromethylether (BCME) - This is considered to be carcinogenic to humans. It reacts on the lungs to produce oat cell carcinoma and has a shorter latency period than asbestos. BCME could only have been produced in this workplace if its precursors, formaldehyde and hydrogen chloride, were present simultaneously and able to react. These substances could potentially be present as thermal degradation products of polyethylene and polyvinyl chloride. However, the Panel found that it was virtually impossible for the abnormal operating conditions sufficient to have resulted in simultaneous production of formaldehyde and hydrogen chloride to have developed. Therefore, medical opinion on the physiological effects of BCME was not required.

3) Polycyclic aromatic hydrocarbons (PAHs) - PAHs are an important factor in lung cancer excess. Benzopyrene is a PAH. It is found in cigarette smoke. It is also found in coal and asphalt tar. The worker smoked an average of one pack of cigarettes per day. He also had exposure to asphalt tar.

There were a number of other substances regarding which the Panel did not require medical evidence, either because they were not known carcinogens, there was not sufficient exposure or they were only relevant as precursors to other elements. These substances included acrolein, epichlorohydrin, formaldehyde, hydrogen chloride, methylene chloride, neoprene, polycaprolactam, polyethylene, polyvinyl chloride and phthalates.

The Panel also required medical evidence about the synergistic effect of the interaction between asbestos and PAHs.

The Panel recognized a co-counsel retained by the appellant. This counsel was also the lawyer for a union that had wanted to intervene in the proceedings. Retention of co-counsel seemed a reasonable alternative to the application for intervenor status. It would expedite proceedings without unduly prejudicing the position of the parties. [39 pages]

WCAT Decisions Considered: 134/891 reld to, 681/89 apld

Board Directives and Guidelines: Operational Policy Manual, Document no. 04-04-16

DECISION NO. 572/91 (16/10/91) Moore Felice Barbeau

Supplements, older worker - Board Directives and Guidelines (supplements, older worker) (adjustment to employment requirements).

A bricklayer suffered a back injury in 1961 for which he was awarded a pension. He underwent retraining

and became a dental technician in 1964. In 1979, he took a job as a sales representative for a ceramic tile company. He quit that job in 1984 after he was told he would have to take on additional duties. The worker applied for an older worker supplement in 1985 when he was 62 years old. The worker appealed a decision of the Hearings Officer denying entitlement to the supplement.

The Hearings Officer found that the worker had adjusted to the employment requirements attributed to his disability and, therefore, did not have an impairment of earning capacity that was significantly greater than usual.

The worker's reasons for leaving his job in 1984 were not relevant pursuant to s. 45(7) of the pre-1985 Act. The worker met the threshold test for an older worker supplement. His disability precluded him from returning to his pre-accident employment. His disability, age, education, etc., precluded him from returning to comparable employment. The fact that he maintained employment for 20 years did not mean that he had adjusted to the employment requirements attributed to his disability. The limitations imposed by his disability were always present and appeared to have contributed, at least in part, to his decision to terminate his employment in 1984. In addition, the employment requirements attributed to his disability were clearly a factor contributing to the inability to find employment after 1984.

The appeal was allowed. [7 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-17; Operational Policy Manual, Document no. 05-03-09

DECISION NO. 597/91 (16/10/91) Faubert M. Cook Shuel

Earnings basis (recurrences) - Earnings basis (escalation) - Earnings basis (maximum).

The worker objected to the Board's calculation of his earnings basis and compensation rate for benefits that he received starting in 1987.

The worker, then aged 24, was injured in 1969. His average earnings at that time were in excess of the maximum earnings basis under the Act, so that his temporary benefits were paid at the maximum rate allowable.

The worker was awarded a pension in 1970 that was presently rated at 25%. He returned to work, but in 1974 he suffered a recurrence of his compensable disability. From 1974 to 1977 the worker was paid temporary benefits. Once again, his weekly earnings exceeded the maximum earnings base applicable in 1974 and his benefits were paid at the maximum compensation rate allowable under the Act. The worker had not returned to work since the 1974 recurrence. He suffered another recurrence in July 1987.

The Board determined that the calculation for temporary benefits, payable after July 1987, should be on the basis of the worker's most recent earnings -- those in 1974, including the appropriate indexing factors. This was based on s. 40 of the pre-1985 Act.

The first issue was whether the worker was entitled to the statutory escalation of the compensation rate allowed by s. 42 (1) of the pre-1985 Act. That provision was repealed and replaced by s. 133(3) of the pre-1989 Act. Section 42, as it read prior to 1985, specifically required that a worker be in receipt of temporary benefits and have continuously received them for the immediately preceding 12 months. As the worker was not in receipt of any temporary benefits between 1977 and 1987, s. 42 had no application to the worker's circumstances. The worker was not entitled to the escalations referred to in s. 133(3) of the pre-1989 Act because he failed to meet the statutory requirement that he be in receipt of temporary benefits on the day the section came into force (April 1, 1985) or on July 1, 1985 (when an additional escalation of benefits was enacted).

At the time of the 1974 recurrence, the worker's earnings were \$265 weekly, but the amount of his

benefits was restricted by the statutory maximum earnings basis which was then \$231. The worker argued that his benefits in 1987 should be based on his full 1974 earnings and not restricted by the 1974 maximum ceiling because in 1987 the weekly maximum earnings basis was \$577. (In fact, the worker's compensation rate in 1987 fell below the minimum rate payable under the 1987 Act, even though in 1974 he was receiving the maximum rate.) The statutory amendments which increased the ceiling for the purposes of calculating the compensation rate could only be interpreted as providing that the increased ceilings applied to accidents which occurred after the dates of the amendments. The increased ceilings thus did not apply in this case.

The worker argued that he should at least receive the compensation rate payable in 1977 if it was greater than the 1974 rate. The worker failed to point out any statutory provision, applicable to the period from 1974 to 1977, that allowed for such an escalation of continuing temporary benefits.

The Panel noted the apparent inequity for claimants in this worker's position. However, the means to redress this inequity lay with the Legislature and not the Panel. [18 pages]

Sa: 43(7) [40 pre-1985], 133(3) pre-1989 [42(1) pre-1985]

WCAT Decisions Considered: Decision No. 1013/89 (1990), 17 W.C.A.T.R. 86 consd

DECISION NO. 309/90 (17/10/91) Strachan Klym (dissenting in part) Apsey
L.W. Mathews Equipment Ltd. v. Gabourie

Section 15 application (remoteness) - In the course of employment (contemporaneity) - Products liability - Negligence - Supplier of motor vehicle, machinery or equipment (maintenance of equipment) - Damages, contribution or indemnity - Section 15 application (property damage).

The defendants and third parties in a civil case applied to determine whether the plaintiff's right of action was taken away. The third party manufacturer of a mechanical lift sold the lift to the defendant lessor. The lessor leased the lift to the defendant lessee. The lessee subleased it to the defendant sublessee. The sublessee used the lift at a construction site. There was an informal arrangement to let other contractors on the site use the equipment.

The lift broke down on August 8 and 9 and was repaired by a serviceman of the lessor. The sublessee left the site for a number of days beginning August 11. On August 11, a defendant contractor used the lift. The plaintiff's third party employer used the lift on August 12. The plaintiff was seriously injured when the lift toppled.

Section 8(9) takes away the right of action where the workers of both employers were in the course of employment at the time of the happening of the injury. Strict contemporaneity was not required but there must be some reasonable temporal relationship between the accident and the harmful act which contributed to the accident. In this case, the relevant period of time was about four days, which was reasonable.

The immunity of employers from lawsuits was not total. There are situations where the activity of a defendant's workers will be too remote from the accident for the employer to receive the protection of s. 8(9). There must be a sufficient degree of work relatedness to bring the incident within the scope of the Act. The test is whether the defendant's workers have a significant temporal and causal connection with the accident and resulting injury for which benefits are payable to warrant removal of the right to sue.

Section 8(10) is an exception to the immunity provided to employers in s. 8(9). It should be interpreted narrowly.

For purposes of s. 8(9) and (10), the lessor was a hybrid employer. Part of its business was to supply equipment on a rental basis. It provided service for the equipment but did not provide an operator. To the extent that it supplied equipment, it came within the exception in s. 8(10). Accordingly, the plaintiff's

right of action against the lessor was not taken away. However, the lessor was also the employer of a worker, the serviceman, and was entitled to the protection of s. 8(9) with respect to his negligence. The lessor was entitled to a declaration under s. 8(11) that it will not be liable for any damages, contribution or indemnity regarding loss or damage caused by the fault or negligence of its serviceman. The lessor was also entitled to a declaration under s. 8(11) regarding the plaintiff's employer and any other defendant against whom the plaintiff's claim is barred.

The right of action against the contractor that used the lift on August 11 was taken away. Its employees were in the course of employment at the relevant time. Section 8(9) applied to take away the right of action.

The right of action was also taken away as against the sublessee. Its workers were in the course of employment at the time of any alleged negligence.

The right of action against the lessee that subleased to the sublessee was not taken away. The lessee was a financial conduit whereby the lift passed from the owner/lessor to the sublessee/user. Section 8(10) applied. The lessee was entitled to a declaration under s. 8(11) regarding the serviceman or any other party against whom the claim is barred.

The manufacturer was an American corporation. It was not a Schedule 1 employer. The right of action was not taken away. It was entitled to a declaration under s. 8(11).

The plaintiff's employer and a number of other third parties were also entitled to declarations under s. 8(11).

The Panel had no jurisdiction regarding a claim for property damage and made no order.

The Worker Member dissented regarding the lessor and the other parties in relation to the serviceman. The Worker Member found that since the lessor supplied equipment within s. 8(10), the provisions of s. 8(9) do not apply. If s. 8(10) applies, an employer is exempted from all provisions of s. 8(9). Otherwise, lawsuits would almost always be barred since it is difficult to conceive of situations of negligence where workers are not involved. In addition, the Worker Member would have concerns about granting a declaration under s. 8(11) without reference to s. 8(9). The Worker Member would not have granted a declaration under s. 8(11) regarding negligence of the serviceman. [35 pages]

Ss: 8(9), 8(10)

WCAT Decisions Considered: Decision No. 725 (1987), 4 W.C.A.T.R. 266 consd; Decision No. 503/87 (1987), 6 W.C.A.T.R. 144 reld to; Decision No. 503/87 (1987), 8 W.C.A.T.R. 156 consd; Decision No. 259/88 (1988), 9 W.C.A.T.R. 272 reld to; Decision No. 17/89 (1990), 16 W.C.A.T.R. 46 reld to; Decisions No. 422/87 reld to, 314/88 reld to, 789/88 reld to, 961/88 reld to, 755/89 consd

DECISION NO. 614/90 (17/10/91) Bigras Robillard Nipshagen

Disablement (repetitive work) - Office worker (data entry clerk).

A data entry clerk appealed a decision of the Hearings Officer denying entitlement for elbow and shoulder disability. On the evidence, the Panel found that the worker's condition was a disablement from the repetitive nature of the worker's work. She first felt discomfort while sitting in an unfavourable body position on a chair which did not fit her physical requirements and typing on a keyboard placed on top of a standard secretarial desk. The pain increased when the worker assumed a heavier work load.

The appeal was allowed. [7 pages]

DECISION NO. 713/91I (17/10/91) McIntosh-Janis Beattie Chapman

Adjournment (additional evidence).

The worker was appealing denial of temporary benefits from February 1985 to November 1986. It appeared that the Board has since granted a provisional psychiatric pension. The hearing was adjourned to obtain medical reports regarding psychiatric treatment and to obtain information from the Board regarding psychiatric entitlement. [5 pages]

DECISION NO. 725/91 (17/10/91) Kenny Higson Howes

Disablement (repetitive work) - Carpal tunnel syndrome.

The worker appealed a decision of the Hearings Officer denying entitlement for bilateral wrist disability, diagnosed as carpal tunnel syndrome. The worker started working for the employer as a stenographer in 1980. Nine months later she became a receptionist counsellor. She still did typing and answered about 200 phone calls per day. Five years later she became a counsellor. This job involved a lot of driving and writing.

On the evidence, the Panel found that the worker's wrist disability was related to the repetitive nature of her work. She may have had a predisposition to develop the disability, but the work was a significant contributing factor.

The appeal was allowed. [7 pages]

DECISION NO. 160/90A (18/10/91) Moore Beattie Jago

Procedure (addendum) (clarification of decision) - Scope of hearing - Issue setting - Natural justice.

The worker requested clarification of Decision No. 160/90. In Decision No. 160/90, the majority of the hearing panel denied benefits subsequent to March 1982 for a back condition. The Vice-Chairman, dissenting, would have granted benefits for chronic pain, which had not been considered by the Board. The worker then applied to the Board for benefits for chronic pain. The Board denied the claim on the grounds that the Tribunal had implicitly rejected entitlement for chronic pain.

The majority opinion of the hearing panel did not consider entitlement for chronic pain, nor did the parties consider it to be an issue before the Tribunal. Although the Tribunal may have had broad jurisdiction over the issue, the requirements of natural justice impose limits over the Tribunal's power to rule on issues over which it has jurisdiction. In this case, the only issue before the hearing panel was ongoing entitlement for organic disability.

The Board may have interpreted Decision No. 160/90 as it did because of the views expressed in the dissent. However, the dissent cannot expand the issue agenda or impose the issue agenda on the majority.

The Panel clarified Decision No. 160/90 by stating that it was not a final decision on non-organic disability and that that issue could be pursued at the Board. [4 pages]

WCAT Decisions Considered: 160/90 consid

DECISION NO. 600/91 (18/10/91) Moore Shartal Jago

Second Injury and Enhancement Fund (severity of preexisting condition).

The employer appealed a decision of the Hearings Officer denying entitlement to SIEF relief. The worker suffered a minor injury in 1988. She had suffered a previous injury in 1981. The Panel found that the Hearings Officer did not give sufficient weight to the opinion of a doctor about the 1981 injury. It contained an explanation of why the prior injury was medically significant.

The appeal was allowed. The employer was entitled to 50% SIEF relief. [6 pages]

Board Directives and Guidelines: Claims Services Division Manual, s. 108(2), p. 235, Directive 1

DECISION NO. 601/91I (18/10/91) Moore Shartal Jago

Adjournment (additional issues).

The employer was appealing a decision of the Hearings Officer granting benefits for a disablement from the nature of the worker's work in 1987. At the hearing, it became apparent that previous levels of adjudication at the Board had denied entitlement on the basis of either disablement or recurrence of a 1981 injury. The parties were not prepared to address the issue of whether the 1987 disability was a recurrence of the 1981 injury. However, the Panel felt that this issue could have significance on other aspects of the claim and affected both the worker's and the employer's interests.

The hearing was adjourned. [5 pages]

DECISION NO. 625/91 (18/10/91) Faubert Robillard Preston

Medical examination (section 21).

The worker objected to the employer's request that the worker attend for a medical examination at a doctor selected by the employer.

The worker injured his ankle at work and had surgery performed on it twice. He was currently performing part-time modified work with the employer. The worker's doctors were completing fitness assessment forms requested by the employer on a monthly basis.

The employer had a valid compensation goal in being concerned about the worker's degree of disability and fitness for modified work. However, the requested medical examination was not important to the achievement of that goal.

If the employer required more specific information than contained in the assessment forms, it should have first resorted to the less intrusive alternative of seeking such information directly from the worker and his doctors. The worker and his doctors had co-operated with the employer's requests for information in the past, including an examination by another doctor selected by the employer. There was no indication that the worker's doctors were unqualified to provide the information, that they were unreliable, or that the employer's doctor had special qualifications.

The employer's request was denied. [5 pages]

WCAT Decisions Considered: Decision No. 174 (1986), 2 W.C.A.T.R. 96 apld

DECISION NO. 640/91 (18/10/91) Chapnik Shartal Meslin*Accident (occurrence).*

The Panel found that the worker's inguinal hernia did not result from a work accident, which was alleged by the worker to have occurred in April 1988. The worker claimed that he felt, or at least heard, a ripping in his right groin as he turned and lunged to catch a falling bottle.

There were inconsistencies in the worker's testimony, some of which related to the very way in which the accident occurred. The worker did not relate any specific incident as being the cause of the hernia to two doctors. The worker's manager testified that the worker only told him about the existence of the hernia, but not about a work accident. The worker did not report a work-related accident to the health department at work until June 1988. [6 pages]

DECISION NO. 715/91L (18/10/91) Kenny Higson Howes*Leave to appeal (good reason to doubt correctness) (consideration of evidence).*

The worker appealed a decision of the WCB Appeal Board denying ongoing entitlement subsequent to December 1967. The Appeal Board found that the worker made a full recovery following accidents in 1966 and 1967.

Medical reports at the time indicated that some, if not most, of the worker's disability was psychogenic. At that time chronic pain was not compensable and that may explain the Appeal Board's conclusion. In a number of previous Tribunal decisions, it was decided that it was not necessary for a worker to apply for leave to appeal before applying to the Board for a review of a claim based on chronic pain. However, the Panel did not have to decide that question in this case. Considering the worker's disability from all sources, there was good reason to doubt the correctness of the Appeal Board decision.

Leave to appeal was granted. The worker may wish to return to the Board to give the Board an opportunity to deal with the issue of chronic pain. [7 pages]

WCAT Decisions Considered: 862L *reld to*, 669/87L *reld to*, 522/88L *reld to*, 376/91 *reld to*

Cases Considered: Review of Decisions No. 915 and 915A (1990), 15 W.C.A.T.R. 245 (WCB Bd. of Directors) *consd*

DECISION NO. 1034/89RI (21/10/91) Ellis M. Cook Chapman*Procedure (reconsideration) (application and merits together).*

The defendant in a civil case applied to reconsider Decision No. 1034/89. In Decision No. 1034/89, the hearing panel found that the plaintiff was not a worker and that, therefore, the plaintiff's right of action was not taken away.

The application for reconsideration was based on grounds of a conspicuous error in finding that the plaintiff was not a worker. In the circumstances, a determination on the threshold issue would not only determine the question of whether the decision should be re-opened but would also effectively determine the ultimate disposition of the case on the merits.

Since submissions had been requested on the threshold issue only, the Panel reserved its decision and requested submissions on the merits. [5 pages]

WCAT Decisions Considered: Decision No. 850/87R (1990), 14 W.C.A.T.R. 1 *reld to*; Decision No. 1034/89 *reld to*

DECISION NO. 629/90 (21/10/91) Onen Lebert Seguin

Pensions (assessment) (multiple injuries) - Delay (onset of symptoms) - Consequences of injury (iatrogenic illness) (medication).

The worker suffered multiple injuries in a compensable accident in 1983. The worker appealed a decision of the Hearings Officer confirming a 40% pension.

The Panel considered entitlement for a number of conditions which had arisen since the accident. On the evidence, the Panel found that the worker was not entitled to benefits for shortness of breath, urinary problems or right knee swelling. There was insufficient evidence for the Panel to make a decision regarding a fracture of the left ankle. This was a discrete issue which the Panel remitted back to the Board for consideration. He was entitled to benefits for any disability resulting from gastrointestinal problems related to medication taken to control pain. There was evidence of psychogenic pain but the predominant source of pain was organic and the pension should be considered according to the rating schedule for organic disability.

The worker continued to experience pain on the right side of his body, including his back and leg. He used a TNS machine and a back brace. The residual injuries were concentrated in the worker's back and it was appropriate to assess the pension with reference to the benchmarks for back injuries. The Panel was satisfied that the Board considered pain in arriving at the 40% pension. Gastric difficulties were largely controlled by medication and did not alter the level of impairment.

The worker's level of impairment did not exceed 40%. The appeal was dismissed. [15 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 *reld to*
Board Directives and Guidelines: Operational Policy Manual, Document no. 03-03-05

DECISION NO. 13/91 (21/10/91) McGrath Rao (dissenting) Apsey

Continuing entitlement.

The worker suffered a low back disability at work in 1959 for which three days of work were lost. In 1960, 1965 and 1966 the worker experienced recurrences that resulted in no WCB claims and little lost time. The worker's low back problems became acute in 1986 and surgical decompression was performed in 1986.

The majority of the Panel found that the 1959 accident was not a significant contributing factor to the worker's low back disability after 1986. The worker unquestionably had extensive degenerative disc disease throughout his lumbar and sacral spine. That condition was a significant cause of the protrusion that necessitated the 1986 surgery. The worker had back pain flare-ups and chiropractic treatment between 1959 and 1985. But these incidents resulted in only insignificant lost time from work and were separated by periods of three or four years without complaint and periods of six or seven years without treatment. The worker was not entitled to further benefits.

The Worker Member, dissenting, would have granted the worker benefits on the basis that she had never fully recovered from the 1959 accident. She was under the care of doctors and chiropractors during the relevant period and she only managed to continue working by taking painkillers. [12 pages]

DECISION NO. 539/91 (21/10/91) Strachan M. Cook Preston

Continuing entitlement.

The worker suffered a low back strain in 1969 and received benefits for about two weeks. The worker appealed a decision of the Hearings Officer denying further benefits. On the evidence, the Panel found that the worker was suffering from degenerative disc disease. The compensable injury resolved in 1969. The current pain from degenerative disc disease was not related to the compensable accident. The appeal was denied. [11 pages]

DECISION NO. 548/91 (21/10/91) Strachan Shartal Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a reference to a non-compensable condition which was not relevant. [4 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 01-04-11

DECISION NO. 608/91 (21/10/91) McGrath Robillard Chapman

Continuing entitlement.

The worker suffered a left shoulder injury in 1965, diagnosed as as shoulder strain. X-rays taken at that time indicated a relative widening of the left acromioclavicular joint. The worker worked continually after February 1965. In 1988 he saw his doctor for pain in his left shoulder, arm and neck. In 1988 shoulder x-rays were unremarkable, but neck x-rays indicated a probable disc protrusion.

The evidence did not establish a medical connection between the 1965 accident and the 1988 condition, nor was the long period of time without medical attention explained. The worker was not entitled to further benefits. [5 pages]

DECISION NO. 667/91 (21/10/91) Strachan M. Cook Meslin

Medical examination (section 21) - Procedure (section 21) (access to worker file).

The employer applied for an order requiring the worker to attend a medical examination. The Board had not yet made a decision on a request for access to the worker's file. Accordingly, the s. 21 application was premature. The application was denied. [4 pages]

DECISION NO. 668/91 (21/10/91) Strachan M. Cook Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 01-04-11

DECISION NO. 669/91 (21/10/91) Strachan M. Cook Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a number of references which were not relevant. [4 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 01-04-11

DECISION NO. 681/91 (21/10/91) Onen Ferrari Apsey

Adjournment (additional issues).

The worker was appealing denial of an increase in her pension for organic disability and denial of a pension for chronic pain. The hearing was adjourned to allow the issue agenda to be expanded to include psychotraumatic disability. [4 pages]

Practice Directions Considered: Practice Direction No. 9 (1987), 7 W.C.A.T.R. 444

DECISION NO. 27/91 (22/10/91) Faubert McCombie Barbeau (dissenting)

Availability for employment (refusing suitable work).

The worker suffered a low back strain in September 1987. She received temporary total disability benefits until September 5, 1988. She received temporary partial disability benefits until September 12, 1988, when the Board found that she refused suitable work with no wage loss. The worker appealed a decision of the Hearings Officer denying entitlement to full temporary partial disability benefits subsequent to September 12, 1988.

In August 1988, the employer had no suitable employment for the worker. The worker was told by the Rehabilitation Division that she would have to look for suitable work before retraining could be considered. The worker decided to return to school. On September 8, 1988, the employer offered suitable work. The worker refused the job since she had already decided to return to school and since she did not believe the work would continue. The worker did not discuss her plans for retraining with the Rehabilitation Department although, in retrospect, it was apparent that her retraining was successful.

The majority of the Panel concluded that the worker offered a reasonable explanation for her failure to accept the employment. Until September 8, there was no suggestion that the employer would be able to offer

suitable work. Considering her age, disability, skills and level of education, it was reasonable to conclude that a job search would be enhanced by educational upgrading. Although the majority was concerned with the lack of discussion with Rehabilitation, this would be a factor more relevant to sponsorship for the programme.

The appeal was allowed.

The Employer Member, dissenting, found that it was not reasonable for the worker to refuse the suitable work. She had been advised that a job search was necessary before retraining could be considered. It was not the intent of the Act to allow workers to formulate their own rehabilitation plans without input from the Rehabilitation Department. [12 pages]

Ss: 40(2)(b)

WCAT Decisions Considered: Decision No. 112 (1986), 3 W.C.A.T.R. 54 consd; Decision No. 121 (1986), 3 W.C.A.T.R. 81 consd; Decision No. 539/89 (1989), 12 W.C.A.T.R. 208 consd; Decisions No. 812 consd, 595/87 consd, 800/90 consd

DECISION NO. 56/91 (22/10/91) McGrath Robillard Jago

Accident (definition of) - Accident (occurrence).

The worker appealed a decision of the Appeals Adjudicator denying entitlement for accidents in 1962 and 1969. On the evidence, the Panel found that the worker suffered disablements from the nature of his work in 1962 and 1969. Although disablement was not included in the definition of accident in 1962, entitlement was still granted for sprains and strains occurring at work. The appeal was allowed. [7 pages]

WCAT Decisions Considered: 727/89 consd

DECISION NO. 126/91 (22/10/91) Signoroni Shartal (dissenting) Jago

Rehabilitation, vocational (program not offered by Board) - Rehabilitation, vocational (availability for) - Rehabilitation, vocational (cooperation) - Rehabilitation, vocational (job search) - Words and phrases (available, s. 40(2)(b)(i)).

The worker suffered a left hand injury in July 1984 and received benefits until January 1985. In Decision No. 364/88, the worker's appeal from denial of further benefits was allowed but the determination of the nature and duration of benefits was remitted to the Board. The Board found that the worker was entitled to full temporary partial disability benefits until September 1986, 50% benefits from September 1986 to June 1987, full benefits for two weeks in June 1987 while the worker had therapy treatment and no benefits in July 1987. The worker appealed.

The Panel found that the worker was entitled to temporary benefits at the 50% rate in July 1987. He had completed therapy at the end of June. He did not have to wait for a routine follow-up examination in July 1987 before resuming normal activity.

Regarding the period from September 1986 to June 1987, the majority of the Panel found that the worker was not entitled to full benefits. There is an implied obligation on a worker to conduct a job search. By failing to undertake an adequate job search, the worker was not available for a rehabilitation programme which would have helped in returning him to work. The worker was disqualified from receiving full benefits under the provisions of s. 40(2)(b)(i).

The Worker Member, dissenting, noted that this was a case of retroactive adjudication. The Board did

not offer any rehabilitation programme and did not express any opinion about any programme. Section 40(2)(b) is, in essence, a presumption clause which gives workers rights unless they fail to cooperate with a programme that the Board thinks would help them or unless they fail to accept a job that the Board thinks they can do. There is no requirement to cooperate in general.

The Workers' Compensation Act is remedial in nature and should be interpreted broadly in accordance with the intent of the legislation. The intent is to compensate workers who suffer personal injury arising out of and in the course of employment, as set out in s. 3(1). Rehabilitation arises as part of compensation, not as an aim in itself.

The Worker Member concluded that s. 40(2)(b) requires that there be an actual rehabilitation programme that is actually considered by the Board before a worker can be disqualified. Since, in this case, the Board did not offer a programme, the worker was not disqualified from receiving full benefits.

The majority stated that there was not a presumption of entitlement under s. 40(2)(b). The presumption is a statutorily defined and legal concept. Pursuant to s. 3(3), it applies to the issue of arising out of and in the course of employment. It does not apply to the issue of level of benefits for ongoing entitlement. Rather, there is a right of entitlement under s. 40(2)(b) if certain criteria are met.

Section 40(2)(b)(i) refers to cooperation and to availability. Cooperation implies some interaction with a different party (the Board). However, availability does not necessarily require, as a precondition, the initial intervention of the Board to set in motion a programme suitable to the worker.

Section 40(2)(b)(i) refers to aiding in getting the worker back to work and to the provision of medical and vocational rehabilitation. While a major aim of the Act is to provide compensation, there is also a clear intent to assist with rehabilitation.

The appeal was allowed in part. [34 pages]

Ss: 40(2)(b)(i)

WCAT Decisions Considered: Interim Decision No. 2 (1986), 1 W.C.A.T.R. 7 consd; Final Decision No. 2 (1987), 4 W.C.A.T.R. 1 consd; Decision No. 9 (1986), 1 W.C.A.T.R. 23 consd; Decision No. 37 (1987), 5 W.C.A.T.R. 1 consd; Decision No. 51 (1987), 4 W.C.A.T.R. 67 reld to; Decision No. 59 (1987), 5 W.C.A.T.R. 17 consd; Decision No. 121 (1986), 3 W.C.A.T.R. 81 consd; Decision No. 137 (1987), 4 W.C.A.T.R. 87 reld to; Decision No. 202 (1986), 3 W.C.A.T.R. 117 consd; Decision No. 302F (1988), 8 W.C.A.T.R. 30 consd; Decision No. 740 (1987), 4 W.C.A.T.R. 277 consd; Decision No. 529/87 (1987), 6 W.C.A.T.R. 158 consd; Decision No. 584/87 (1987), 6 W.C.A.T.R. 173 consd; Decision No. 212/88 (1988), 9 W.C.A.T.R. 248 consd; Decisions No. 237 consd, 254 consd, 447/87 reld to, 543/87 reld to, 568/87 reld to, 674/87 consd, 698/87 reld to, 834/87 reld to, 927/87F reld

DECISION NO. 157/91 (22/10/91) Newman Jackson Barbeau

Exposure (cadmium) - Industrial disease (poisoning) (cadmium) - Industrial disease (preventative removal) - Occupational Health and Safety Act (exposure) (preventative removal) - Words and phrases (medical condition, s. 1(1)(n)(iii)) - Apportionment (industrial disease).

The worker was employed in the electroplating industry which uses cadmium. Cadmium poisoning is recognized in Schedule 3 as an industrial disease. Blood and urine tests were taken and the worker's whole blood cadmium level was found to be high, in fact, twice that expected for even a heavy smoker. On the advice of his family doctor, the worker stayed off work pending further testing. These subsequent tests revealed that cadmium levels in the worker's blood and urine were within normal levels.

The worker did not claim that he had an industrial disease, but he did claim benefits for his lost income during the six weeks that he removed himself from the workplace pending the further test results. The employer argued that benefits were not payable as the worker's doctor over-reacted to the initial test results and removal from the workplace was unnecessary. Alternatively, if benefits were payable, the employer sought relief

from the costs of this claim.

Expert evidence at the hearing established that the results of the worker's initial tests did not identify a medical emergency. The worker's elevated blood reading, with an almost normal urine reading, indicated that further review of the worker's circumstances was required, but a high urine level would also have to be present to identify a medical emergency.

Section 16(2) of the regulations under the Occupational Health and Safety Act (Ont.) provides that, where a worker suffers a loss of earnings due to removal from potentially hazardous exposure to lead, he is entitled to compensation as provided for under the Workers' Compensation Act (Ont.). An unenacted draft provision provides a similar remedy for workers removed from potentially hazardous cadmium exposure. The Panel found that the reference in the Occupational Health and Safety regulations to entitlement to benefits was directory only and did not expand the scope of the Workers' Compensation Act.

The definition of industrial disease, under s. 1(1)(n)(iii) of the Workers' Compensation Act, includes, "a medical condition" that requires a worker to be removed from exposure to a substance "because the condition may be a precursor to an industrial disease". Entitlement to benefits under the Workers' Compensation Act, for wage loss associated with preventative removal from employment, is thus limited to circumstances in which the worker has a medical condition that may be a precursor to an industrial disease.

In the present case, the test in s. 1(1)(n)(iii) had been met. The words "medical condition" had their ordinary meaning -- a state of the body or mind revealed by medical evaluation. A medical condition does not have to be a negative finding such as a diagnosed illness or disability. The initial test results indicated that the chemical analysis of the worker's blood was abnormal. There was thus a medical condition that was abnormal. This medical condition, of elevated whole blood cadmium, revealed a situation which may have been a precursor to an industrial disease.

Hindsight and detailed subsequent investigation disclosed that, in the absence of elevated urine levels corresponding to the elevated blood levels, it could not be predicted with any degree of certainty that industrial disease would follow unless the worker was removed from exposure. Though the worker's family doctor may have over-reacted, a strict standard of review for such judgments should not be demanded.

Where hazardous exposure is known to exist, and the medical condition reveals an abnormality of sufficient proportions to cause a responsible physician to recommend removal from exposure on the basis that it may be a precursor to an industrial disease, benefits to compensate for wage loss ought to be paid. There is room for physicians to err on the side of prevention and to employ reasonably aggressive preventative measures to protect their patients from industrial disease.

The worker was entitled to benefits for the period of removal from exposure. The costs of this claim, which involved benefits paid for a condition defined as an industrial disease, could not be charged to the account of the individual employer under s. 122(8) of the Workers' Compensation Act. The costs of this claim are to be charged to the class. [13 pages]

Ss: 1(1)(n)(iii)

WCAT Decisions Considered: Decision No. 885/88 (1989), 11 W.C.A.T.R. 163 *reld to*; Decision No. 398/89 (1990), 13 W.C.A.T.R. 195 *apld*
Other Statutes Considered: Occupational Health and Safety Act, R.S.O. 1980, c.321, ss. 23(3), 23 (10), 24 (13), Reg.536/81, s. 16(2)
Board Directives and Guidelines: Operational Policy Manual, Document nos. 04-03-08, 04-04-18, 04-04-20

DECISION NO. 508/91 (22/10/91) Chapnik Shartal Preston

Subsequent incidents (outside work) - Benefit of the doubt.

The worker suffered a low back strain at work in January 1984 and received benefits until February 1984. In

April 1987, the worker experienced pain and numbness in his left leg after doing some housework. The worker appealed a decision of the Hearings Officer denying entitlement for the worker's condition in 1987.

The compensable injury was relatively minor requiring little medical treatment and a short recuperative period. The worker was able to return to work without lost time or medical treatment until 1987. X-rays in 1984 were normal, whereas in 1987 they showed disc degeneration and nerve root irritation. There was conflicting medical evidence but some of the evidence indicated a possible connection between the 1984 accident and the 1987 disability.

The Panel found that the evidence was approximately equal in weight as to whether the compensable accident was a significant contributing factor. Applying the benefit of doubt in favour of the worker, the Panel concluded that the worker was entitled to benefits for his back condition in 1987. The appeal was allowed. [9 pages]

WCAT Decisions Considered: Decision No. 288 (1987), 4 W.C.A.T.R. 127 reld to

DECISION NO. 635/91 (22/10/91) McGrath Jackson Meslin

Continuing entitlement.

The worker was receiving benefits for a back strain in December 1988 when she asked her doctor if it was all right for her to travel out of the country on a family matter. Her doctor told her that this was fine. In January 1989, the worker's doctor told a Board doctor that the worker had no organic restrictions and was fit to return to work in December 1988. The worker received heat treatment for her back while she was out of the country. She returned to Canada in April 1989 and returned to work in May 1989.

The Panel found that the worker's pain between December 1988 and May 1989 was not disabling, that the worker was able to resume her regular employment in December 1988 and, therefore, she was not entitled to benefits after that date. [5 pages]

DECISION NO. 340/90 (23/10/91) Faubert Rao Apsey

Consequences of injury (altered gait) - Aggravation (preexisting condition) (osteoarthritis) (knee).

The worker suffered a serious right ankle injury in 1971 and required a fusion of the ankle in 1974. The worker appealed a decision of the Hearings Officer denying entitlement for osteoarthritis of the right knee, which the worker claimed was either caused or aggravated by the ankle disability.

Considering the medical reports, the Panel found that the ankle fusion would not have caused the osteoarthritis of the knee. However, it did aggravate the worker's preexisting degenerative condition.

Board policy provides for benefits without limit when a preexisting condition is symptomatic at the time of the accident. When the condition was symptomatic at the time of the accident, benefits would be payable for the acute phase only and cease when the worker reaches his pre-accident state. Application of this policy is difficult where there is an injuring process which gradually aggravates an underlying condition which gradually may have become symptomatic without the injuring process. In the circumstances, the aggravation accelerated the progression of the underlying condition and it could not be said that the worker reached his pre-accident state. Therefore, the resulting disability was compensable. The appeal was allowed. [10 pages]

DECISION NO. 474/90 (23/10/91) Moore Beattie Preston

Vibrations (tools) - Carpal tunnel syndrome - Benefit of the doubt.

The worker appealed a decision of the Hearings Officer denying entitlement for carpal tunnel syndrome. Some of the worker's activities, such as use of vibratory tools, could lead to carpal tunnel syndrome. However, doctors disagreed as to whether the worker's condition was work related. Some suggested that a causal relationship could be inferred. Others were of the view that the degree of exposure was insufficient to cause the disability. The evidence on either side was approximately equal in weight. Applying the benefit of doubt in favour of the worker, the Panel concluded that the worker was entitled to benefits. The appeal was allowed. [10 pages]

DECISION NO. 861/90R2 (23/10/91) Moore Drennan Preston

Reconsideration (consideration of issue) - Parties (participation) (reconsideration).

The worker requested reconsideration of Decision No. 861/90. In Decision No. 861/90, the hearing panel concluded that the earnings basis for calculation of benefits should be based on estimated earnings. This was based on the hearing panel's interpretation of s. 11. In Decision No. 861/90R, the original hearing panel denied a request for reconsideration based on new evidence as to actual earnings.

An earlier decision of the Tribunal, Decision No. 547, concluded that s. 11 did not allow the use of estimated earnings to calculate a worker's earnings basis. It appeared that the original hearing panel was not aware of Decision No. 547. The Panel had some doubt as to whether the original hearing panel would have reached the same conclusion had it been aware of Decision No. 547. If the interpretation in Decision No. 547 were accepted, the worker's actual earnings would become central to the decision. The new evidence as to actual earnings would then be relevant to the determination of the worker's earnings basis.

The request to reconsider was granted. The employer did not participate at the original hearing. In these circumstances, the Panel directed that Decision No. 861/90 be re-opened without submissions from the employer on the threshold issue. The employer will have the right to make submissions on the merits. [5 pages]

WCAT Decisions Considered: Decision No. 72R (1986), 18 W.C.A.T.R. 1 reld to; Decision No. 72R2 (1986), 18 W.C.A.T.R. 26 reld to; Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decision No. 547 (1987), 6 W.C.A.T.R. 64 consd; Decisions No. 861/90 consd, 861/90R consd

DECISION NO. 348/91 (23/10/91) Sandomirsky Shartal Apsey

Causation (thin skull doctrine).

The worker suffered left leg injuries in falls in January and March 1968. The worker appealed a decision of the Hearings Officer denying entitlement to a pension for osteoarthritis of the knee.

The worker had a preexisting non-compensable asymptomatic giant cell tumour in his knee. On the evidence, the Panel concluded that the trauma to the knee already made vulnerable by the tumour, caused a fracture of the femoral condyle. The fracture was a significant contributing factor to the development of the osteoarthritis. The appeal was allowed. [8 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 consd

DECISION NO. 909/90 (24/10/91) Ellis Higson Barbeau

Disablement (working conditions) (dampness) - Climate (dampness) - Rheumatic fever - Medical opinion (rheumatic fever) - Investigation by Tribunal (whether required) - Merits and justice - Benefit of the doubt.

The worker appealed a decision of the Hearings Officer denying entitlement for a flare-up of rheumatic fever. The worker had developed rheumatic fever as a child. Medical evidence established that people who have suffered rheumatic fever are susceptible to subsequent flare-ups caused by Group A streptococcal infections. The worker was a mechanic's helper who worked in underground mines. In the weeks before the flare-up, the worker was working in a mine that was cold and wet. The worker submitted that the working conditions in the mine were a significant cause of the flare-up of rheumatic fever.

There was conflicting medical opinion about a relationship between rheumatic fever and dampness. The Board had obtained an opinion from a cardiologist which did not support the relationship. The opinion stated that the doctor could provide references supporting his view. In response to the Panel's request, the doctor sent a letter enclosing a number of articles. The Panel reviewed the articles in detail. One article mentioned overcrowding as a major cause. A previous version of this article had mentioned other factors including dampness. Without evidence of the author, the deletion in the newer version of the article could not be taken as significant evidence of the author's views.

Another article referred to crowding as the major predisposing environmental condition. However, this did not rule out other possibly significant factors. Another article mentioned dampness as a factor. However, the doctor submitting the article stated that he contacted the author, who said he had no evidence of the independent role of dampness in the epidemiology of rheumatic fever.

The Panel was satisfied that the doctor had not provided substantial evidence supporting his opinion. The worker provided some articles supporting a relationship between dampness and rheumatic fever.

Although not argued by the worker, the Panel noted that crowding was a factor mentioned in the medical literature and that crowded conditions are inherent features of underground mining.

There were a number of further medical investigations that the Panel could have pursued, such as contacting the authors of some of the articles. However, the additional evidence already requested had added about seven months to processing of the appeal. Pursuing additional investigation would likely take another year. The "real merits and justice" requires a hearing panel to consider when justice reasonably requires a halt to further investigations and to further delays that such investigations would entail. In this case, the Panel decided not to ask for further investigation. Reasonable efforts had been made and they provided a substantial basis for decision.

Based on the literature, the Panel concluded that damp conditions are conducive to contraction of the Group A streptococcal infection that is the precursor of rheumatic fever. However, it could also have been caused by infection contracted in the non-employment environment. Applying the benefit of doubt in favour of the worker, the Panel found that the worker was entitled to benefits. The appeal was allowed. [22 pages]

WCAT Decisions Considered: Decision No. 559/87 (1988), 9 W.C.A.T.R. 103 *reld to*; Pension Assessment Appeals Leading Case Interim Report (1986), 7 W.C.A.T.R. 365 *reld to*

DECISION NO. 547/91L (24/10/91) Strachan Shartal Nipshagen

Leave to appeal (good reason to doubt correctness) (consideration of evidence).

The worker applied for leave to appeal a decision denying ongoing entitlement for a low back condition.

There was scarce medical evidence. The only opinion of a specialist was supportive of the worker. However, the Appeal Board failed to comment on the report. The absence of reasons gave good reason to doubt the correctness of the Appeal Board decision.

Leave to appeal was granted. [6 pages]

Cases Considered: Muise v. Workers' Compensation Appeal Board (June 6, 1991) (N.S.C.A.) consid

DECISION NO. 581/91 (24/10/91) Bigras Robillard Chapman

Temporary partial disability.

The worker suffered injuries in a compensable accident in 1981. The worker appealed a decision of the Hearings Officer reducing benefits to 50% benefits for temporary partial disability subsequent to June 1984. On the evidence, the worker was temporarily partially disabled and was not cooperating with Rehabilitation. The appeal was dismissed. [7 pages]

DECISION NO. 734/91 (24/10/91) McIntosh-Janis Beattie Jago

Accident (occurrence).

The worker appealed a decision of the Review Board in 1963 denying entitlement for a back condition. The Panel noted that a decision of the Review Board was the equivalent of a decision of the Appeals Adjudicator or Hearings Officer and that, therefore, leave to appeal was not required.

On consideration of all the evidence, the Panel found that the worker did injure his back in an accident at work in 1962. The appeal was allowed. [4 pages]

DECISION NO. 737/91L (24/10/91) McIntosh-Janis Beattie Jago

Leave to appeal (good reason to doubt correctness) (consideration of evidence).

The worker applied for leave to appeal a decision of the Appeal Board denying entitlement for acute psychosis. There was supporting medical evidence but the Appeal Board appeared to rely on the absence of the condition from any specific list of clinical conditions normally considered by the Board. This focus caused the Appeal Board to fail to consider all the relevant medical evidence.

Leave to appeal was granted. [4 pages]

DECISION NO. 739/91I (24/10/91) McIntosh-Janis Beattie Jago

Adjournment (additional issues).

The hearing was adjourned to allow the appellant to pursue other issues at the Board. [3 pages]

DECISION NO. 149/90 (25/10/91) Onen Ferrari Jago*Psychotraumatic disability.*

The worker suffered a back injury in 1984 for which she was awarded a 15% pension for organic disability. The worker appealed a decision of the Hearings Officer denying entitlement for psychiatric disability.

The preponderance of medical evidence supported the conclusion that the worker was suffering from a psychiatric condition which was caused, at least in part, by the compensable accident. Although there were a number of predisposing factors, the Panel was satisfied that the compensable accident was a significant contributing factor to her psychiatric disability.

The appeal was allowed. [10 pages]

DECISION NO. 603/90 (25/10/91) Onen Felice Jago*Accident (occurrence).*

The worker appealed a decision of the Hearings Officer denying entitlement for a back condition which she related either to a specific incident or to the nature of her work as a machine operator.

There was no clear diagnosis for the worker's complaints nor were there significant objective clinical findings. There were a number of inconsistencies in the worker's description of the onset of symptoms. The worker's job was repetitive and rapid but was not heavy and, according to medical evidence, was not of a type that would lead to deterioration of the back.

The appeal was dismissed. [11 pages]

DECISION NO. 970/90 (25/10/91) Onen B. Cook Chapman*In the course of employment (personal activity) - In the course of employment (takes self out of employment)
- Arising out of employment (work relatedness test).*

A security guard was assigned to guard crates outside a loading dock. He could have watched the crates from inside the building and, in any event, was not required to leave to area of the loading dock. The worker's supervisor found the worker asleep in his car. The loading dock was not visible from the car. The supervisor asked the worker to leave the car and return to work. The worker left the car, then decided to park it in a different location. After moving the car, the worker closed the car door on his thumb. The worker appealed a decision of the Hearings Officer denying entitlement for the thumb injury.

It was not necessary to decide whether the worker was in the course of employment while asleep in the car. It was clear that he was in the course of employment after he was asked by his supervisor to leave the car.

The majority of the Panel found that the worker remained in the course of employment when he moved the car. This was a routine, minor personal task which did not detract from the overall status of being in the course of employment. The Employer Member disagreed on this point only and found that moving the car was a distinct departure from employment which took him out of the course of employment.

The Panel found that the accident did not arise out of employment. There was no significant work connection between moving the car and employment. The car was not used for an employment purpose and the

need to move it did not result from an employment purpose. The predominant character of the accident was personal.

The appeal was dismissed. [12 pages]

DECISION NO. 684/91 (23/10/91) Newman Shartal Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a number of references which were not relevant. [4 pages]

DECISION NO. 746/91I (25/10/91) Sandomirksy M. Cook Jago

Adjournment (additional submissions).

The worker was appealing a decision of the Reinstatement Officer finding that the employer had fulfilled its obligations under s. 54b. The hearing was adjourned to allow for submissions on a number of issues: application of s. 54b to a worker who returns to work without intervention of the Board; effect of a notice from the Board that the worker was capable of performing the essential duties of his job six months before the notice was sent; obligation of a trustee in bankruptcy or a successor employer to re-employ; application of the presumption in s. 54b(10) where the worker was not re-employed in accordance with s. 54b. [4 pages]

WCAT Decisions Considered: 372/91 reld to

DECISION NO. 103/91 (28/10/91) Faubert Lebert Nipshagen

Pensions (assessment) (burns).

The worker suffered severe burns to his leg, back, buttocks and arm in a compensable accident. The worker appealed a decision of the Hearings Officer confirming a 15% pension.

The worker was not entitled to an award for disfigurement since he did not suffer burns to the head. Psychological impairment from disfigurement was not argued and the Panel made no findings in that regard.

The worker had scars over his upper and lower extremities but they did not appear to have impaired the worker's range of motion (except for his shoulder for which he had been awarded an additional 5% pension). He had a pulling sensation in his groin, could not be exposed to sun, extremes of temperature or chemicals and had difficulty sitting for prolonged periods of time.

Compared with the rating schedule of 30% for a fully immobile lumbosacral spine, the Panel found that the worker's 15% award was appropriate. The appeal was dismissed. [9 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to; Decision No. 144/88 consd

DECISION NO. 165/91 (28/10/91) Sandomirsky Jackson Nipshagen*Continuity (of treatment) - Preexisting condition.*

The worker suffered a toe injury in June 1985. In December 1985, while at HRC, she suffered a back injury when she was struck by a medicine ball. The worker appealed a decision of the Hearings Officer denying benefits subsequent to January 1986 and denying entitlement for neck, thoracic and left shoulder conditions, for headaches and dizziness, for a lumbosacral support, for arch supports and for breast reduction surgery.

Considering lack of continuity of treatment, the Panel found that the worker was not disabled by her foot injury subsequent to January 1986.

The worker suffered an injury to her upper back as a result of the incident at HRC. The worker was partially disabled by the upper back problem until her return to work in September 1986. She cooperated with medical and vocational rehabilitation and was entitled to full benefits.

The lower back problems were related to a preexisting condition rather than the incident in December 1985. The worker was not entitled to benefits for lumbosacral or arch supports since any ongoing lumbosacral or foot disabilities were not compensable.

According to medical reports, the worker had large breasts which aggravated her back and neck problems. However, the Panel found that this preexisting condition was not aggravated by the compensable accident. The size of the worker's breasts, and any aggravation they may have caused her back, was an independent factor affecting her condition and not related to the accident. Therefore, the worker not entitled to benefits for breast reduction surgery.

The appeal was allowed in part. [10 pages]

DECISION NO. 218/91IR (28/10/91) Ellis Robillard Chapman*Reconsideration (procedural error) - Procedure (reconsideration) (constitution of panel) - Investigation by Tribunal (whether required).*

The worker applied for reconsideration of Decision No. 218/91I. At the original hearing of the employer's appeal, the employer filed written statements but did not bring any witnesses or make any submissions. The original hearing panel indicated that it would review the file and make a decision. However, on reviewing the file, the original hearing panel found that it could not reach a decision without oral evidence from the worker. The Panel issued Decision No. 218/91I, in which it stated that oral evidence would be required, constituted itself as a Case Direction Panel and requested that a new hearing on the merits be scheduled before a new panel.

Whatever a panel decides orally, in the pressurized circumstances of a hearing, as to the sufficiency of evidence, is always subject to the implicit condition that, if it becomes apparent that the decision was wrong, the panel can reconvene to obtain additional evidence. It was not necessary to invite submissions from the parties as to whether further evidence was needed. The request to reconsider, based on failure to request submissions on the need for further evidence, was denied.

It is not unusual for a hearing panel to constitute itself as a Case Direction Panel and to refer the hearing of the merits to another panel. However, in this case, the decision to refer to another panel came sufficiently far into the proceedings that, implicitly, it presented potentially contentious issues on which the parties might reasonably have expected to be consulted.

If the decision to reconstitute itself as a Case Direction Panel were to be reversed, the original panel

would have to resume hearing and deciding the appeal. This decision should be left to the original panel. Accordingly, the Panel referred the request to reconsider the decision to reconstitute itself as a Case Direction Panel back to the original panel with the recommendation that it hear submissions from both parties both on the threshold issue and, if necessary on the merits of whether the decision to reconstitute should be revoked. [8 pages]

WCAT Decisions Considered: 218/91I consid

DECISION NO. 685/91 (28/10/91) Newman Shartal Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a reference which was not relevant. [3 pages]

DECISION NO. 707/91 (28/10/91) McIntosh-Janis Crocker Ronson

Rehabilitation, vocational (academic training) - Board Directives and Guidelines (rehabilitation) (training).

The worker suffered a foot injury for which he was awarded a 12% pension. The worker appealed a decision of the Hearings Officer denying an increase in the pension and denying sponsorship for a Bachelor of Science degree and a Masters degree in marine ecology.

The worker was a trained commercial diver. He was working as a sales clerk in a dive store at the time of the accident. The Panel found that the worker was not entitled to sponsorship. The worker had not established that appropriate alternative work was not possible without the training he proposed. He dismissed the possibility that anything less than the Masters degree in marine ecology could involve him in a long term career which would take his interests and skills into account. Further, the worker submitted no objective evidence concerning employment opportunities in the field of marine ecology. In addition, vocational testing indicated that the worker did not necessarily have the aptitude or ability to complete the programme.

The Panel noted its concern that the worker and the Board had not been able to cooperate to consider appropriate rehabilitation programmes for the worker. The was due both to the worker's insistence on restricting his options and to the Board's apparent failure to consider the worker's interests.

The Panel confirmed the 12% pension but noted that the worker could pursue initial entitlement for a back condition which he claimed resulted from the accident.

The appeal was dismissed. [8 pages]

WCAT Decisions Considered: Decision No. 112 (1986), 3 W.C.A.T.R. 54 reld to
Board Directives and Guidelines: Operational Policy Manual, Document no. 07-03-07

DECISION NO. 389/89 (29/10/91) Onen B. Cook Ronson

Consequences of injury (iatrogenic illness) - Reflex sympathetic dystrophy - White finger disease.

The worker suffered a right hand injury in 1978 and returned to work after one week. In 1981, she

underwent surgery for right carpal tunnel syndrome. This condition was accepted by the Board as being related to the 1978 accident. Subsequently, the worker developed a bilateral hand and arm disability. The worker appealed a decision of the Hearings Officer denying entitlement for the bilateral hand and arm disability.

The worker's complaints changed after the 1981 surgery. Prior to the surgery, she reported carpal tunnel symptoms of weakness, numbness and pain, primarily in her right hand and wrist. After the surgery, she reported gradual onset of aching pain and numbness in her wrists and arms up to the shoulder, associated with cold exposure and activity. The Panel was satisfied that there was a temporal connection between the compensable surgery in 1981 and the development of Raynaud's type symptoms of wrist and arm pain and weakness.

The Panel found that, after the surgery, the worker developed a mild form of reflex sympathetic dystrophy. As a result of this condition, the worker developed a Raynaud's type of condition in her left hand and arm mirroring the condition that developed in her right hand and arm. The Raynaud's type symptoms developed after the compensable surgery and, more likely than not, were caused by the surgery.

The appeal was allowed. [14 pages]

WCAT Decisions Considered: 389/89I reld to

DECISION NO. 297/91IR (29/10/91) Onen Lebert Preston

Reconsideration.

The worker's request to reconsider Decision No. 297/91I was denied. In Decision No. 297/91I, the hearing panel adjourned the hearing due to non-compliance with the three week rule. The hearing panel also did not make a final decision about its jurisdiction to consider a claim for stress. The decision, to let the panel that would be considering the merits also decide the issues over which it had jurisdiction, was reasonable. [4 pages]

WCAT Decisions Considered: 297/91I reld to

DECISION NO. 617/91 (29/10/91) Stewart Robillard Apsey

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 618/91L (29/10/91) Stewart Robillard Apsey

Leave to appeal (good reason to doubt correctness) (evidence to support Appeal Board conclusion).

The worker applied for leave to appeal a decision of the Appeal Board denying continuing entitlement to temporary benefits. New medical reports submitted by the worker did not constitute substantial new evidence. There was evidence to support the Appeal Board conclusion. The fact that the worker's pension was subsequently

increased did not support a conclusion that the worker was temporarily totally disabled during the period in question.

Leave to appeal was denied. [4 pages]

DECISION NO. 664/91 (29/10/91) Singh M. Cook Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 347/91 (30/10/91) Sandomirsky Shartal Apsey

Continuity (of treatment).

The worker suffered a back injury in March 1988 for which he received medical aid benefits only. The worker appealed a decision of the Hearings Officer denying entitlement for his back condition in September 1989. Considering inconsistencies in the worker's evidence, lack of continuity of treatment and only vague continuity of complaint, the Panel found that there was insufficient evidence to conclude that the 1988 accident resulted in a disability in September 1989. The appeal was dismissed. [7 pages]

DECISION NO. 410/91 (30/10/91) Robeson Drennan Apsey

Availability for employment (disabled by non-compensable condition).

The worker suffered a right shoulder injury in November 1986 and received benefits until December 1986. The worker appealed a decision of the Hearings Officer denying further benefits.

The worker broke her left wrist in a non-compensable accident in December 1986. The Panel found that the worker was temporarily partially disabled by her compensable condition subsequent to December 1986. She was unavailable (due to the broken wrist) for suitable work which was available with the accident employer at no wage loss. Accordingly, she was disqualified from receiving full benefits under s. 40(2)(b). According to Board policy, when a worker is unavailable for work, the worker is entitled to compensation proportionate to the degree of ongoing compensable problems. Usual Board policy is to pay such benefits at the 50% rate.

The appeal was allowed. The worker was entitled to benefits at the 50% rate. [15 pages]

Ss: 40(2)(b), 40(3)

WCAT Decisions Considered: Final Decision No. 2 (1987), 4 W.C.A.T.R. 1 *reld to*; Decisions No. 431/87 *reld to*, 387/88 *reld to*, 534/88 *reld to*
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-19-09; Claims Services Division Manual, s. 40(2), p. 97, Directive 3

DECISION NO. 753/91 (31/10/91) B. Cook Lebert Preston

Suitable employment.

The worker sprained his left hand in May 1982. The worker appealed a decision of the Hearings Officer

denying benefits subsequent to the day of the accident.

The employer offered the worker modified work at no wage loss, which the worker refused. However, there was reason to believe that the work was not suitable. The worker could only work with one hand. Although some of the modified work could have been done with one hand, there were other aspects of the job which would have required use of both hands.

The appeal was allowed. The worker was entitled to full benefits until the end of July 1982, when, as best as could be determined from the evidence, the worker was no longer disabled. [7 pages]

DECISION NO. 961/88R (31/10/91) Onen Drennan Preston

Reconsideration (new issue).

The applicant on a s. 15 application applied for reconsideration of Decision No. 961/88. In Decision No. 961/88, it was determined that the right of action against the applicant was not taken away since the applicant did not have workers who maintained trucks and that, therefore, the applicant did not come within s. 8(9).

Since this decision was released, the pleadings were amended to claim against the applicant for failure to maintain the truck and trailer. The Panel decided to reopen the decision to consider this new issue concerning the trailer. The rehearing would not affect the decision regarding the truck. [7 pages]

WCAT Decisions Considered: Decision No. 72R (1986), 18 W.C.A.T.R. 1 reld to; Decision No. 72R2 (1986), 18 W.C.A.T.R. 26 reld to; Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decision No. 850/87R (1990), 14 W.C.A.T.R. 1 reld to; Decisions No. 961/88I reld to, 961/88 reld to

DECISION NO. 356/90 (31/10/91) Moore McCombie Meslin

Fibromyalgia - Medical opinion (fibromyalgia) (cold) - Disablement (repetitive work) - Climate (cold).

A meat wrapper appealed a decision of the Hearings Officer denying entitlement for fibrositis which the worker claimed was related to the repetitive nature of her work and to the cold environment in which she worked.

The Panel accepted medical evidence that cold can play a role in the development of fibrositis in a susceptible person. There were a number of employment related factors that were contributing factors to the worker's development of fibrositis: the cold environment; repetitive work and intermittent lifting of heavy boxes; renovations to the workplace, following which symptoms developed.

The Panel found that the worker's condition was a disablement arising out of and in the course of employment. The appeal was allowed. [14 pages]

WCAT Decisions Considered: Decision No. 280 (1987), 6 W.C.A.T.R. 27 reld to; Decision No. 559/87 (1988), 9 W.C.A.T.R. 103 reld to; Decision No. 218/90 reld to

DECISION NO. 433/91 (31/10/91) Moore B. Cook Barbeau

Heart attack - Presumptions (section 3).

The employer appealed a decision of the Hearings Officer granting dependency benefits to the widow of a

worker who died of a heart attack. The worker was a miner who operated a jack leg drill. His body was found beside his drill about three hours after the start of his shift.

There was no evidence of thrombosis or myocardial infarction. The only other explanation for the heart attack was coronary arrhythmia (the heart muscle was unable to function on the amount of oxygen that it was receiving). Although coronary arrhythmia can occur at any time, the prerequisite seems to be an increase in the heart's demand for oxygen. While this could occur without exertion, it appeared to the Panel that exertion could bring about the increased demand for oxygen that leads to coronary insufficiency.

The worker's job required physical exertion on a daily basis. In this case, it was clear that the accident occurred in the course of employment. However, certain key factual elements were unknowable. His activities at the time of his death were unwitnessed.

Where all factual elements are knowable, a determination can be made on the balance of probabilities. However, where certain factual elements are not knowable, it is not possible to make a determination on the balance of probabilities. This is the situation in which the presumption clause is meant to apply.

In this case, it could not be established by clear and convincing evidence that the heart attack did not arise out of employment. The worker's job required physical exertion. Since his activities were unwitnessed, the Panel could not know the degree of exertion at the time of death or the precise way in which the fatal symptoms came on. It could not be determined that nothing unusual preceded the heart attack.

The appeal was dismissed. [11 pages]

Ss: 3(3)

WCAT Decisions Considered: Decision No. 42/89 (1989), 12 W.C.A.T.R. 85 reld to; Decision No. 224/90 (1990), 14 W.C.A.T.R. 310 reld to

DECISION NO. 712/91 (31/10/91) B. Cook Rao Nipshagen

Chronic pain (marked life disruption) - Board Directives and Guidelines (chronic pain)
(marked life disruption) - Continuity (of treatment).

The worker sustained a compensable injury to her right ring finger in 1978 and a compensable injury to her right hand and wrist in 1980. The worker continued to complain of problems with her wrist, hand and finger, but did not seek medical treatment between 1980 and 1985. She stopped work in 1986 because of hand and wrist pain and from that point began receiving continuing, at times intensive, medical treatment.

The worker clearly had a right hand and wrist disability, but it appeared to be predominantly, if not totally, non-organic in nature. The Panel found that the worker had a marked life disruption, present since at least late 1985, as that term was defined in the Board's current policy guidelines. The Panel was satisfied that the two compensable accidents played a significant role in the development of the disability. The lack of treatment did not mean that the worker had no problems between 1980 and 1985, but rather that the level of her disability was not significant at the time. The worker was entitled to benefits under the Board's chronic pain policy guidelines. [9 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 03-03-05

DECISION NO. 309/91 (01/11/91) Hartman M. Cook Chapman

Continuing entitlement.

The worker suffered a knee injury in 1986. The worker appealed denial of benefits subsequent to 1988.

On the evidence, the accident was minor. The compensable condition resolved by the time benefits were terminated in 1988. The continuing knee condition was related to pre-existing degenerative changes. The appeal was dismissed. [7 pages]

DECISION NO. 607/91 (1/11/91) Flanagan Lebert Apsey

Second accident - Intervening causes (conduct of worker) - Subsequent incidents (outside work) - Consequences of injury (iatrogenic illness) (treatment) (rehabilitation program).

The worker suffered a compensable low back injury for which she was receiving a 20% pension. She now sought entitlement to benefits for two other conditions which she claimed were sequelae of the compensable low back condition. The first was an upper back, neck and shoulder condition. The second was a knee condition.

The worker claimed that her upper back, neck and shoulder condition was the result of doing gymnastic exercise during her rehabilitation treatment at HRC. Nothing in the record supported the worker's claim that she suffered a specific second injury by accident during that treatment. The treatment was not of a repetitive or strenuous nature and there was little or no evidence to indicate any progressive disablement over the course of treatment. The worker was not entitled to benefits for this condition.

The worker's serious knee condition was caused by doing housework, that otherwise would have required bending, on her knees. She avoided bending because of the pain it caused to her low back. She continued to do such housework to feel useful.

Where a second injury by accident is directly attributable to a previous compensable injury, it may reasonably be regarded as a sequela of the original accident and is compensable. However, entitlement for the second injury will not be established if some other unrelated contributing factor is so dominant as to amount to an intervening cause breaking the chain of causation between the original injury and the second injury. A trivial incident involving ordinary, regularly performed activity, is not sufficient to break the chain of causation. In the context of aggravation outside employment of a compensable condition, the worker's conduct may be relevant. Intentional and unreasonable conduct outside of the workplace, even if it does not amount to serious and wilful misconduct, may be sufficiently significant to break the chain of causation.

In this case the worker failed to avoid housework that would require her to work on her knees, or even to take simple precautions such as use of a pillow to protect her knees, despite the recommendations of her doctor and her son. The worker was able to perform other domestic activities, which did not involve injury to her knees, that would provide her with an important opportunity to feel useful around the house. It was not necessary for the worker to perform housework on her knees and she knew that such work was likely to injure her knees. This was not a case of a trivial incident involving a regularly performed activity. The worker's conduct was unreasonable and contrary to all common sense. It was sufficient to break the chain of causation between the compensable injury and her knee condition. The worker was not entitled to benefits for her knee condition. [11 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to; Decision No. 673/89 (1989), 13W.C.A.T.R. 223 reld to; Decision Nos. 367 distd; 348/87 reld to; 466/87 reld to; 1023/87 reld to; 904/89 reld to; 975/89 consd; 347/90 reld to; 14/91 reld to
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-27-01; Operational Policy Manual, Document no. 03-04-03

DECISION NO. 648/91 (01/11/91) Bigras Robillard Seguin

Suitable employment (suitable for worker's capabilities) (personal characteristics of worker).

The worker suffered a knee injury in November 1985. The worker appealed denial of temporary benefits subsequent to June 1988.

The worker was a miner. He could not return to his pre-accident job. In June 1988, he began an apprentice programme with the accident employer training as a hoistman. This involved operating a cage hoist in response to bell signals. The worker felt extremely nervous performing this work and stopped after two weeks.

The worker was physically capable of performing the job as a hoistman. However, he did not have the necessary intellectual and emotional qualifications for the job. He had a hearing impairment and was very nervous about doing a job which depended on hearing acuity. He feared committing fatal errors due to confusion about the bell signals. This was a reasonable explanation, considering his knowledge of a previous accident involving a hoist, his hearing difficulties, lack of personal confidence, low level of education and lack of confidence in his instructor. Vocational rehabilitation programmes must fit not only the worker's physical capabilities, but also his personal aptitudes.

The panel concluded that the work as a hoistman was not suitable. The appeal was allowed. [8 pages]

WCAT Decisions Considered: 400/91 consd

DECISION NO. 722/91 (01/11/91) Faubert Lebert Chapman

Pensions (assessment) (back).

The worker suffered a back injury in 1951. He was awarded a 10% pension in 1968, increased over the years to 60% in 1987. The worker appealed a decision of the Hearings Officer denying a further increase in the pension.

On the evidence, the Panel found that the 1987 assessment included all sources of impairment, including a substantial pain component. The 60% award adequately reflected the worker's level of impairment. The appeal was dismissed. [11 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 consd

DECISION NO. 614/89 (04/11/91) Bigras Lebert Preston

Accident (occurrence) - Pensions (arrears) - Hearing loss.

The worker was awarded a pension for hearing loss. The pension was awarded from a date in 1981 three months before audiograms revealed hearing loss at a compensable level. The worker appealed denial of the pension from a date in 1956 when the worker claimed to have suffered hearing loss while using a sledge hammer.

The worker worked at a concrete company from 1956 to 1960. At other times he was a truck driver. The Board granted the pension for hearing loss based on noise exposure as a truck driver.

The occurrence of an accident in 1956 could not be established. Despite extensive efforts, records of doctors and hearing aid centres could not be found to show that the worker complained of hearing loss or bought a hearing aid.

There was evidence that the worker began to complain of hearing loss in 1976. Medical evidence from a s. 86h assessor indicated that people do not complain much about hearing loss of less than 30 decibels. The Panel concluded that the worker's hearing loss reached the compensable level of 30 decibels in 1976.

The appeal was allowed in part. The worker was entitled to the pension from 1976. [8 pages]

DECISION NO. 128/91 (04/11/91) Moore M. Cook Barbeau

Accident (occurrence).

A sewing machine operator appealed a decision of the Hearings Officer denying entitlement for a back strain. The Panel found that the worker suffered the injury when she twisted and bent over to pick up a bundle of material. The accident occurred near the end of the worker's shift and symptoms developed gradually over the evening. There was medical evidence that the accident and the gradual onset of symptoms were consistent with the injury. The appeal was allowed. [7 pages]

DECISION NO. 584/91 (04/11/91) Bigras Robillard Barbeau

Delay (onset of symptoms).

A logger suffered multiple fractures of the arm and shoulder in 1967 when he was struck by a falling tree. The worker appealed a decision of the Hearings Officer denying entitlement for a neck disability.

There was a delay in onset of neck symptoms until 1970. The neck condition was diagnosed as degenerative cervical disc disease and congenital scoliosis. The medical evidence indicated that a relationship between the neck condition and the accident was possible. In addition, the Panel found other elements which supported a causal relationship. The tree glanced off the worker's hard hat before striking him on the shoulder. It was reasonable that medical attention was focused on the serious fractures suffered and that any reports of neck pain would have been seen as resulting from the shoulder trauma.

The appeal was allowed. [13 pages]

DECISION NO. 598/91 (04/11/91) Bigras Felice Apsey

Temporary disability (beyond pension level).

The worker appealed a decision of the Hearings Officer denying temporary benefits subsequent to March 1989. On the evidence, the worker was not disabled beyond his 20% pension level. The appeal was dismissed. [5 pages]

WCAT Decisions Considered: 96/87 reld to

DECISION NO. 679/91 (04/11/91) McGrath Rao Chapman

Access to worker file, s. 77 - Procedure (absent parties).

The worker was not present for the hearing of his s. 77 appeal. The Panel allowed the worker one week to present a reasonable explanation for his absence. Nothing was heard from the worker. The Panel decided the case on the basis of the written submissions.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 714/91 (04/11/91) Sandomirsky Crocker Preston

Accident (occurrence).

The worker appealed a decision of the Hearings Officer denying entitlement for a thumb injury which the worker claimed he suffered at work when a bar fell on his thumb in an unwitnessed accident.

Evidence of co-workers was vague and inconsistent. However, the worker's evidence was consistent and credible. There was a reasonable explanation for the worker's delay in seeking medical attention.

The appeal was allowed. [7 pages]

WCAT Decisions Considered: Decision No. 307/90 (1991), 17 W.C.A.T.R. 127 *reld to*

DECISION NO. 1030/89 (06/11/91) Signoroni Higson Preston

Stress, mental - Aggravation (preexisting condition) (stress, mental) - Medical opinion (stress) - Disablement (stress) - Significant contribution (of employment to disability) (subjective reaction of worker) - Police - Bias - Three week rule (witnesses) (summary of evidence).

A police officer appealed a decision of the Hearings Officer denying entitlement for a stress related disability.

In a preliminary matter, the Panel dealt with the following issue. In compliance with Tribunal procedure, the employer provided summaries of the expected evidence of three witnesses. At the hearing, the employer said it might not call these witnesses. The Panel decided that there was no reasonable apprehension of bias, even though it had seen the summaries of evidence. However, the Panel felt that the evidence that these witnesses could provide would be relevant. The Panel instructed Tribunal counsel to subpoena the witnesses.

The worker joined the police force in 1962. In 1968, he joined the criminal investigation division (CID). In 1972, he returned to uniformed duty. In 1981, he returned to the CID. He was off work from March 1984 to December 1984 with symptoms including anxiety attacks, crying spells, tension, depression, sleeplessness, frustration and restlessness. He returned to work until December 1986 when he suffered an anxiety attack while on duty.

Originally, the worker related his 1984 lay-off to demanding CID work in 1983 and 1984, specifically the investigation of three murders, one rape and one fatal car chase. The employer cross-questioned the worker about a number of non-work related factors and documented evidence of medical attention for anxiety in 1976. The worker then referred to earlier investigations that he claimed contributed to his condition.

On the evidence, the worker was already suffering from anxiety and depression in 1976. The worker's

condition gradually worsened. By 1982, the condition had become chronic and the worker was almost continuously dependent on medication. At the start of the two periods of lay-off (March 1984 and December 1986), the worker experienced non-organic symptoms that rendered him disabled.

Life and work experiences cannot be adequately separated in assessing the causes of stress. Stress involves the interaction of appraisal of the situation and coping with the perceived situation. Chronic workplace stress must be compensated under the ordinary rules applicable to all claims.

In this case, regarding life experiences, the worker did not have a happy childhood. He also had a history of alcohol abuse. Regarding work experiences, the Panel concluded that work was not a significant contributing factor prior to the documented symptoms in 1976. The Panel noted that it was only after cross-questioning that the worker raised the prior investigations.

There was sufficient objective basis to determine that the criminal investigations in 1983 and 1984 aggravated the worker's non-compensable preexisting condition. There was no change in his personal circumstances at that time or in his drinking habit. His condition reverted to its pre-accident state by the time he returned to work in December 1984.

The worker's workload after December 1984 was within the usual range of police work for a person who did not have ongoing emotional problems. However, it was excessive, considering the worker's preexisting condition. The Panel was satisfied that employment again surfaced as a significant factor contributing to the period of disability commencing in December 1986.

The appeal was allowed. The worker was entitled to benefits for aggravation of his preexisting condition in 1984 and 1986. [63 pages]

WCAT Decisions Considered: Decision No. 6 (1986), 3 W.C.A.T.R. 14 *reld to*; interim Decision No. 24 (1986), 1 W.C.A.T.R. 93 *reld to*; Decision No. 918 (1988), 9 W.C.A.T.R. 48 *reld to*; Decision No. 1018/87 (1989), 10 W.C.A.T.R. 82 *reld to*; Decision No. 45/89 (1990), 14 W.C.A.T.R. 74 *reld to*; Decision No. 322/89 (1991), 18 W.C.A.T.R. 93 *reld to*; Decision No. 684/89 (1990), 16 W.C.A.T.R. 132 *reld to*; Decision No. 980/89 (1990), 13 W.C.A.T.R. 304 *reld to*; Decisions No. 781 *reld to*, 1153/87 *reld to*, 1272/87 *reld to*, 497/88 *reld to*, 536/89 *reld to*, 621/89 *reld to*, 952/89 *reld to*, 262/90 *reld to*, 312/90 *reld to*, 520/90 *reld to*

Cases Considered: Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369 *reld to*

DECISION NO. 77/91I2 (06/11/91) McGrath Lebert Chapman

Summons.

In Decision No. 77/91I, the Panel refused to accept into evidence a report from the worker's doctor prepared at the request of the employer's representative without the worker's consent.

The employer's representative now requested that the Tribunal subpoena the doctor to testify at the hearing. The Panel requested submissions on this issue. [3 pages]

WCAT Decisions Considered: 77/91I *reld to*

DECISION NO. 235/91 (06/11/91) Hartman Jackson Jago

Pensions (assessment) (shoulder).

The worker sought an increase in his 12% pension rating for his right shoulder disability. He could no longer do some yard work, fix his car or play golf.

The Panel did not accept that the existence of a rotator cuff tear was not reflected in the Board's

pension assessment, or that there had been any deterioration in the worker's shoulder condition from the time of the assessment. The worker's benefits reflected degenerative changes in the rotator cuff even though the Board felt that they were significant and predated the compensable injury.

The worker argued that he was assessed prematurely. He was assessed 18 months after the accident, though the Board policy suggested that the referral time for assessment for shoulder injuries was two years from the injury. There was no evidence to suggest that his condition differed over the intervening six months.

The Rating Schedule was not intended to reflect the actual impairment of earning capacity of a specific worker, but rather the deemed impairment of the average worker with a similar injury. The Rating Schedule provides for a 35% rating for a totally frozen shoulder and 15% for an ankylosed shoulder. The worker's shoulder was neither frozen nor ankylosed. His 12% rating more than adequately reflected the restriction of movement in his shoulder. [7 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 apd
Board Directives and Guidelines: Operational Policy Manual, Document no. 05-03-02

DECISION NO. 317/91 (06/11/91) McCombie Jackson Apsey

Exposure (solvents) (Stoddard solvent) - Exposure (carbon monoxide) - Aggravation (preexisting condition)(asthma).

The worker appealed a decision which held that his asthmatic condition was not aggravated by his employment. The worker was exposed to carbon monoxide and Varsol (the trade name for mineral spirits known as Stoddard solvent).

While the evidence confirmed that both carbon monoxide and Varsol may cause health problems, neither is known to cause negative respiratory effects generally, or to aggravate asthma specifically.

Varsol may have caused transient irritation, but it did not alter the course of the worker's non-compensable asthma. The onset of the worker's condition began before his exposure to Varsol. The worker's condition had not improved in the eight years since he left the employment environment, in fact, it was deteriorating. The appeal was dismissed. [7 pages]

DECISION NO. 680/91 (06/11/91) McIntosh-Janis Fuhrman Howes

Pensions (assessment) (finger) (amputation).

The worker suffered an injury to his right thumb, resulting in amputation of the tip of the right distal phalanx. The worker appealed a decision of the Hearings Officer denying an increase in his 5% pension.

The 5% award came from a strict application of the Rating Schedule. However, the award was inadequate since it assumed that the worker's only disability related to the loss of the distal phalanx of the thumb. It did not take into account the remaining disability with the rest of the thumb, which included sensitivity to cold and pressure, and diminished flexibility and grip.

Comparing the worker's disability with the Rating Schedule, the Panel found that the worker was entitled to a pension of 7.5%. The appeal was allowed. [6 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to; Decision No. 221/91 consd
Board Directives and Guidelines: Operational Policy Manual, Document no. 05-03-03

DECISION NO. 686/91 (06/11/91) Newman Shartal Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a number of personal references which were not relevant. Although considerable medical information related to a non-compensable condition, the employer was entitled to access since this information was relevant to the issue of nature and extent of the worker's disability. Because of the sensitive nature of the information, the material was released to the employer's representative, with access to the employer at the representative's office. [3 pages]

DECISION NO. 710/91I (06/11/91) Newman Shartal Nipshagen

Supplements, temporary - Adjournment (referral to Board) - Issue setting (consolidation of issues).

The worker was appealing denial of a temporary supplement. The Panel noted that a clear understanding of the degree of a disability is crucial to determination of entitlement to a supplement. Additional input from the Board was desirable in this case.

The hearing was adjourned. The matter was referred back to the Board to reassess the worker's 10% award for organic disability, to assess the worker for a pension due to non-organic disability and to consider temporary benefits for a period regarding which the Board had not made a final decision. The worker could then return to the Tribunal to appeal any of these issues. [4 pages]

WCAT Decisions Considered: Decision No. 495/88 (1988), 10 W.C.A.T.R. 241 reld to; Decision No. 289/91 reld to

DECISION NO. 736/91 (06/11/91) Newman Lebert Chapman

Rehabilitation, vocational (cooperation).

The worker appealed a decision of the Hearings Officer denying a temporary supplement from November 1983 to June 1984. The Hearings Officer found that the worker did not cooperate with rehabilitation.

The worker's condition caused him considerable physical discomfort and severe psychiatric symptoms. None the less, he conducted a job search, actively sought employment and saw his treating doctors. The Panel found that the worker cooperated with rehabilitation, both vocational and medical. The appeal was allowed. [6 pages]

DECISION NO. 738/91 (6/11/91) Onen Shartal Meslin

Pensions (lump sum) (ten per cent pension) - Board Directives and Guidelines (commutation)(ten per cent pension).

The worker was receiving a 10% pension for a low back injury. Even at the young age of 23, he had premature degenerative disc disease superimposed on a congenital abnormality. He would be unable to resume heavy employment. The worker requested a lump sum payment of his benefits under s. 45(4). Pursuant to that section, he was entitled to the lump sum, unless the Board could show that it was not to his advantage.

According to the Board's policy, the Board had to be satisfied that it was medically reasonable to

conclude that the worker's impairment of earning capacity would not change. The Hearings Officer denied the worker's request as he found that the worker's condition was likely to deteriorate.

The Panel found that the likelihood of physical deterioration was insufficient to justify denial of a lump sum payment pursuant to the policy. Where workers could continue in their new jobs in spite of the deterioration, there would be no effect on the workers' actual earning capacity. There would also be cases where workers would not be dependent on the compensation income, regardless of a further deterioration. In such cases it could not be said that a commutation was not to the worker's advantage and the test set out in s. 45(4) of the Act would not have been properly considered.

In this case, the worker's condition was minor and it was not certain that the condition would deteriorate. In any event, any deterioration that might occur could be attributed to his underlying condition rather than the compensable injury. The worker's financial situation was stable and he would be able to continue his present employment even if his condition were to deteriorate. The evidence indicated that the worker would invest the lump sum conservatively for his future security.

The worker was entitled to a lump sum payment. [9 pages]

Ss: 45(4) pre-1989

Board Directives and Guidelines: Commutation of Pensions Policy, Board Minute 4, April 3, 1987, p. 5186

**DECISION NO. 773/91 (06/11/91) Strachan Shartal Meslin
Debiasio v. Parissi**

Section 15 application - In the course of employment (proceeding to and from work) (employer's vehicle) - In the course of employment (reasonably incidental activity test).

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken away. The issue was whether the defendant driver was in the course of employment at the time of a motor vehicle accident.

The defendant left the job site at the end of his shift. He drove the employer's vehicle and had two co-workers with him. He realized that he left tools at the job site and was returning to pick them up when the accident occurred.

The Panel found that the defendant was in the course of employment. The truck was regularly used to transport workers and equipment to job sites. It was also used by the worker to answer emergency calls. In addition, it was used to store tools since the employer did not allow tools to be left at the job site. Although there were mixed personal and employment elements to the defendant's activity, the Panel found that the predominant character of the activity was employment related.

The right of action was taken away. [8 pages]

WCAT Decisions Considered: 1173/87 apld

Board Directives and Guidelines: Operational Policy Manual, Document no. 03-02-02

DECISION NO. 154/91R (07/11/91) B. Cook Jackson Jago

Reconsideration.

The worker's request to reconsider Decision No. 154/91 was denied. There was evidence to support the

hearing panel's conclusion that the worker was partially disabled during the period in question, including medical reports and evidence that the worker was working during the period. [4 pages]

WCAT Decisions Considered: Decision No. 72R (1986), 18 W.C.A.T.R. 1 reld to; Decision No. 72R2 (1986), 18 W.C.A.T.R. 26 reld to; Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decision No. 850/87R (1990), 14 W.C.A.T.R. 1 reld to; Decision No. 154/91 reld to

DECISION NO. 384/91 (07/11/91) Chapnik M. Cook (dissenting) Apsey

Continuing entitlement - Credibility.

A taxi driver suffered a left shoulder injury in June 1989. He appealed a decision of the Hearings Officer denying temporary partial disability benefits from September 1989 to January 1990.

The worker was receiving pensions totalling 31% for a number of previous injuries. The majority of the Panel had serious concerns about the worker's credibility, based on inconsistencies in his evidence. In addition, the majority preferred the medical report of a Board doctor over that of the worker's treating doctor. The treating doctor's reports mentioned neck pain as well as shoulder pain and referred to multiple injuries. The majority concluded that the shoulder condition was not disabling subsequent to September 1989.

The appeal was dismissed.

The Worker Member, dissenting, preferred the evidence of the worker's treating doctor over that of the Board doctor and found the worker to be credible. [13 pages]

WCAT Decisions Considered: 174/87 reld to, 756/88 reld to, 463/89 reld to

DECISION NO. 411/91 (07/11/91) Chapnik Higson Meslin

Arising out of employment (reasonably incidental activity test) - In the course of employment (reasonably incidental activity test) - In the course of employment (employer's premises).

The worker received permission from his foreman to leave work early. He called a taxi to meet him at gate 2. However, the gate was locked. He climbed the eight-foot gate and jumped down on the other side, fracturing both heels. The worker appealed a decision of the Hearings Officer denying entitlement.

The Panel concluded that the risk assumed by the worker when jumping the fence was not reasonably incidental to employment. There were easier, safer alternative routes to leaving the premises than jumping the fence. He could have walked about 10 minutes to gate 1 or called security to open the gate. Workers occasionally jumped the fence when it was locked but there was no indication that this was authorized or condoned by the employer.

The appeal was dismissed. [10 pages]

WCAT Decisions Considered: Decision No. 24F (1990), 13 W.C.A.T.R. 1 reld to; Decision No. 714/87 (1987), 6 W.C.A.T.R. 235 reld to; Decisions No. 580/87 reld to, 148/88 consd, 804/89 consd, 956/89 consd, 101/90 consd

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-05-02; Operational Policy Manual, Document no. 03-01-02

Cases Considered: Decision No. 2 (1973), 1 B.C.W.C.R. 7 consd; Lane v. Gleaves Volkswagen, 40 Or. App. 136, 594 P. 2d 1249 (1979) consd

DECISION NO. 705/91 (07/11/91) McGrath Higson Barbeau

Withdrawal (of appeal).

The appeal was withdrawn to allow the worker to pursue entitlement on the basis of disablement at the Board. The claim had only been adjudicated on the basis of a specific accident. [3 pages]

DECISION NO. 724/91 (07/11/91) B. Cook Crocker Jago

Withdrawal (of appeal).

The appeal was withdrawn to allow the worker to pursue the issue of chronic pain at the Board. [6 pages]

DECISION NO. 641/91 (08/11/91) Hartman Jackson Preston

Access to worker file, s. 77 (subsequent disclosure).

Access to the worker's file was granted to the employer, except for a reference which was not relevant. The Panel noted that only the persons employed by the employer to handle WCB claims and the person retained by the employer to pursue a particular claim are entitled to access. Other employees are not to have access. [3 pages]

DECISION NO. 642/91 (08/11/91) Hartman Jackson Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a number of references in vocational rehabilitation reports that were not relevant. The issues in dispute were continuing entitlement and SIEF relief. The deleted material related to physical ailments of the worker's spouse. Even if a spouse's condition could be relevant to a claim, the condition could not be relevant in this case since the condition arose after the period in question. [3 pages]

DECISION NO. 644/91 (08/11/91) Hartman Jackson Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

**DECISION NO. 767/91 (08/11/91) Strachan Rao Nipshagen
McCooye v. Ross**

Section 15 application - In the course of employment (travelling).

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken

away. The issue was whether the plaintiff was in the course of employment at the time of a motor vehicle accident. The accident occurred in an airport parking lot. The plaintiff was going to take a flight in order to attend a business meeting the next morning. The plaintiff travelled regularly on business. The Panel concluded that the plaintiff was in the course of employment. Her right of action was taken away. [9 pages]

WCAT Decisions Considered: Decision No. 44 (1986), 2 W.C.A.T.R. 8 reld to; Decision No. 123 (1986), 2 W.C.A.T.R. 66 reld to; Decision No. 547/87 (1988), 8 W.C.A.T.R. 160 reld to; Decision No. 759/88 reld to

Cases Considered: Nancollas v. Insurance Officer, [1985] 1 All E.R. 833 (C.A.) consd

DECISION NO. 804/91 (08/11/91) Strachan Crocker Nipshagen

Employer (successor rights) - Board Directives and Guidelines (employer assessment) (successor rights).

The employer (A Co.) appealed a decision of the Hearings Officer denying entitlement to a new firm number. A Co. was a Schedule 1 employer incorporated in Ontario. It was a wholly owned subsidiary of a British company (X Co.). In 1989, another British company (Y Co.) acquired the shares of X Co. in an arms length transaction. All the shares of A Co. held by X Co. were transferred to Y Co. In 1990, the name of A Co. was changed to B Co.

Board policy differentiates between asset purchases and share purchases. In the case of an asset purchase, a new firm assessment number is given since there is a new business entity. In the case of a share purchase, a new number is not given since, although ownership has changed, the business entity remains the same. The Board has broad discretionary powers regarding assessment. Board policies must be fair and reasonable. In an assessment policy, the policy must balance the interests of the individual employer and the interests of the rate group and the compensation system as a whole.

In corporate law, there are benefits and burdens flowing from the form of commercial acquisition. In an asset purchase, the purchaser does not acquire the corporate liabilities, unless specifically included. However, there may be income tax consequences regarding depreciation and capital costs. In a share purchase, the purchaser acquires the debts and liabilities of the company.

In this case, Y Co. could have structured its acquisition differently so that it purchased only the assets of A Co. However, it structured it as a share purchase. Parties to a commercial transaction agree to all the benefits and burdens which accompany the form of transaction. A Co. is a continuing legal entity, despite the name change and changes to the board of directors and management.

The Board policy was not unreasonable when considered from the perspective of balancing interests of the individual employer and the rate group. The appeal was dismissed. [13 pages]

WCAT Decisions Considered: Decision No. 86/89 (1990), 14 W.C.A.T.R. 63 reld to; Decision No. 792/89 (1990), 16 W.C.A.T.R. 150 reld to
Board Directives and Guidelines: Operational Policy Manual, Document no. 08-01-08

Cases Considered: Constitution Insurance Co. v. Kosmopoulos (1987), 34 D.L.R. (4th) 208 (S.C.C.) consd

DECISION NO. 920/90 (13/11/91) McGrath B. Cook Preston

Foot deformities (spinal stenosis) - Rheumatoid arthritis.

The worker suffered a low back injury in 1973. He was awarded a 15% pension that was ultimately increased to 60%. The compensable back injury resulted in the worker having spinal stenosis which left him with a neurological deficit in the lower limbs. In 1980 the worker was diagnosed as having non-compensable

rheumatoid arthritis which affected several joints, including his feet.

The worker sought benefits for neck, left wrist and bilateral foot disabilities. The worker began complaining of foot pain in 1974. He experienced burning, numbness and various foot deformities (including: pes cavus, drop foot and hallus valgus). Four operations were performed on the worker's feet between 1985 and 1987. The employer argued that these disabilities were due to the rheumatoid arthritis.

There was no medical corroboration for the worker's claim that his carpal tunnel wrist disability and his neck disability were the result of the strain of his trying to lift himself without using his back. These disabilities were not related to the back injury and were thus not compensable.

The rheumatoid nodules present in the worker's feet were a natural reaction to bony prominence in the feet of a rheumatoid arthritis sufferer. These bony prominence were the result of the foot deformities and not the cause of them. The worker's foot deformities were predominantly caused by the worker's neurological deficit which stemmed from his compensable lumbar spine injury. The worker was entitled to benefits for his bilateral foot condition. [10 pages]

DECISION NO. 814/90 (13/11/91) McIntosh-Janis Drennan Apsey

Withdrawal (of appeal).

The appeal was withdrawn with respect to the issue of chronic pain to allow the worker to pursue entitlement at the Board. [3 pages]

WCAT Decisions Considered: 814/90 reld to

DECISION NO. 334/91 (13/11/91) Hartman Furhman-Thompson Chapman

Temporary disability (beyond pension level).

The worker suffered a low back injury in 1987 for which he was awarded a 10% pension. The worker appealed a decision of the Hearings Officer denying temporary total disability benefits for a period in 1988 and a period in 1989. On the evidence, the worker was not temporarily totally disabled. The appeal was dismissed. [7 pages]

DECISION NO. 578/91L (13/11/91) McGrath Jackson Barbeau

Leave to appeal (good reason to doubt correctness) (consideration of evidence).

The worker was awarded temporary and permanent benefits for abdominal injuries resulting from a blow to the abdomen that was of sufficient force to knock him unconscious and rupture his spleen. The worker sought leave to appeal an Appeal Board decision denying him benefits for subsequent low back, ulcer and psychotraumatic conditions.

The Appeal Board relied completely on the Board's medical opinions without giving any reason for preferring them to the extensive differing opinions of the worker's treating physicians. As the Appeal Board failed to address the weighty opinions of the treating specialists which linked the compensable accident to the subsequent conditions, there was good reason to doubt the correctness of its decision.

The opinion of the Board doctor, which was relied on by the Appeal Board to deny the worker's psychotraumatic disability claim, stated: "Personality related attitudinal response should not be accepted as compensable". This constituted an adjudicative opinion rather than a medical opinion. As the Appeal Board relied on this doctor's adjudicative opinion, there was good reason to doubt the correctness of its decision.

Leave to appeal was granted. [8 pages]

WCAT Decisions Considered: Decision No. 131 (1986), 2 W.C.A.T.R. 77 apld; Decision No. 331 apld

DECISION NO. 587/91 (13/11/91) Strachan Jackson Preston
Jewett v. Monniello

Section 15 application - Worker - Independent operator.

The Panel found that the plaintiff in a court action was a worker, rather than an independent contractor, and that his right of action was thus taken away. The plaintiff delivered food to various stores and restaurants for P Co.

The cheques paid to the plaintiff by P Co. had a notation indicating that he was a subcontractor and no payroll deductions were made. The plaintiff had another job, working a few evenings a week at a restaurant. However, looking at the substance rather than the form of the worker's relationship with P Co., these factors were outweighed by those indicating an employer/worker relationship. The major piece of equipment used by the plaintiff was a van which was owned by P Co. The plaintiff was paid a relatively fixed rate with little prospect of profit or loss. The plaintiff provided delivery services only for P Co. He provided this service on a long-term basis and intended to continue doing so indefinitely. He provided the same services as two other delivery persons employed by P Co., who were designated as workers. [13 pages]

WCAT Decisions Considered: Decision No. 921/89 (1990), 14 W.C.A.T.R. 207 apld

DECISION NO. 666/91 (13/11/91) Singh M. Cook Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 673/91I (13/11/91) Faubert Fuhrman-Thompson Meslin

Summons - Medical examination (section 21).

The Panel determined two preliminary matters.

The employer requested that the Tribunal summons the worker's family doctor to give evidence at the hearing. The worker had obtained unemployment insurance benefits after receiving treatment from the doctor in May 1988. In July 1988 the worker claimed for compensation benefits as a result of work performed in May 1988. An April 1990 report by the doctor described the worker's ongoing condition and also stated that the doctor received information subsequent to May 1988 that the worker attributed the onset of pain to the work performed.

The employer's desire to obtain more specific information about how and when the doctor received the subsequent information was reasonable. However, the matter could be addressed by obtaining written evidence from the doctor, in accordance with the Tribunal's usual practice. This was not a matter which concerned the doctor's credibility as a physician, or that arose out of a change in medical opinion. The request to summons the doctor was refused.

The employer's request that the worker be examined under s. 21 of the Act was also denied. Since the essence of the dispute in this case concerned discrepancies in the worker's reports of onset of pain, it was not clear how a current medical examination would contribute to the resolution of this appeal. Moreover, there were several outstanding medical reports that had not yet been received by the parties, so that it was difficult to conclude that the employer would be hampered in effectively presenting its case. [6 pages]

WCAT Decisions Considered: Decision No. 174 (1986), 2 W.C.A.T.R. 96 apld; Decision Nos. 4291 apld, 1272/8713 apld

DECISION NO. 735/91 (13/11/91) Faubert Felice Preston

Earnings basis (wage loss supplement).

The worker suffered a compensable injury in 1974. Following an on-the-job training programme in 1980, the worker continued working but at reduced wages. The worker received a temporary supplement to his wages under s. 43(5) of the pre-1985 Act. The worker suffered another injury in 1981. The worker appealed a decision of the Hearings Officer calculating his benefits on the basis of earnings with the second employer but not including the wage loss supplement in the calculation.

The Panel agreed with Decision No. 797/89 and found that the wage loss supplement should be included in the worker's earnings basis. The supplement was an important part of the worker's rehabilitative programme and his employment remuneration. The appeal was allowed. [22 pages]

WCAT Decisions Considered: Decision No. 797/89 (1990), 14 W.C.A.T.R. 175 apld

DECISION NO. 218/91IR2 (14/11/91) Sandomirsky Higson Barbeau

Withdrawal (of application) - Reconsideration.

In Decision No. 218/91I, the original panel found that it did not have enough evidence to make a decision and constituted itself as a Case Direction Panel. In Decision No. 218/91IR, a different panel dismissed an application for reconsideration of the decision to obtain further evidence but asked the original panel to hear submissions regarding the decision to constitute itself a Case Direction Panel.

The worker stated that the thrust of his reconsideration application was to have the original panel decide the case without further evidence. Since the application was denied on this point, the worker had no objection to the decision to constitute as a Case Direction Panel. The request to reconsider was withdrawn. [4 pages]

WCAT Decisions Considered: 218/91I reld to, 218/91IR reld to

DECISION NO. 446/91 (14/11/91) McCombie Shantal Barbeau

Issue setting - Jurisdiction, Tribunal (Board implicitly dealt with issue) - Psychotraumatic disability - Brain damage.

The Hearings Officer held that the worker was entitled to temporary benefits for three specified periods, but that for the last two periods he was only entitled at the 50% level. The employer appealed and the worker cross-appealed. In an interim decision, the issues were defined as being whether the worker was temporarily disabled during the periods in question, either by an organic or non-organic condition, and what level of benefits should be paid if the worker was found to be disabled. The worker now wished to put in issue entitlement to temporary benefits after the specified periods considered by the Hearings Officer and the level of the worker's pension.

The Panel refused to consider the additional issues proposed by the worker. Even though the Hearings Officer appeared to consider only organic disability, the issue was extended to non-organic disability by the interim decision because non-organic disability was implicitly before the Hearings Officer. It could not be said that entitlement to benefits after the specified periods was implicitly before the Hearings Officer, when it was the worker's former representative who stated that temporary benefits after the end of the specified dates were not being sought. Deciding these additional issues would not finalize the matter for the worker as other issues were still before the Board. There is a limit to even a broad view of the Tribunal's jurisdiction.

The worker was thrown forward into the windshield of a loader that he was driving at work. He suffered a whiplash injury. Shortly before the work accident the worker had been off work as a result of non-compensable low back problems. After the work accident, when no further organic spinal problems were evident, the worker continued to have psychological problems and eventually a 30% provisional pension was awarded on that basis. There was a medical report, supported by thorough testing of the worker, which theorized that the worker had suffered an organic brain injury during the accident.

The Panel found that, after the work accident, there was a profound change in the worker's condition affecting his ability to work and his community activities. He was totally disabled during the periods in question due to the compensable accident. He cooperated in medical treatment and attempted to return to work. The worker was entitled to full benefits. [17 pages]

WCAT Decisions Considered: Decision No. 446/911 reld to

DECISION NO. 749/91 (14/11/91) McCombie Rao Howes

Continuing entitlement.

The worker injured his back in 1969. The diagnosis at that time was a prolapsed disc. He now claimed benefits for a period of lost time in 1980. The worker did not seek medical treatment from 1972 to 1980, but there was credible evidence of ongoing minor complaints during that period, from the worker and his ex-wife. The worker wrote to the Board in 1978 to alert it of his ongoing complaints. There was also medical opinion supportive of the claim. The worker was entitled to benefits. [7 pages]

DECISION NO. 754/91 (14/11/91) B. Cook Lebert Preston*Delay (onset of symptoms).*

The worker appealed a decision of the Hearings Officer denying entitlement for current neck, arm and shoulder problems, which the worker claimed were related to a compensable accident in 1970. Considering lack of continuity and delay in onset of reported neck problems until 1975, the Panel found that the current condition was not related to the compensable accident. The appeal was dismissed. [6 pages]

DECISION NO. 787/91I (14/11/91) Sandomirsky Robillard Nipshagen*Adjournment (notice).*

The hearing was adjourned due to confusion regarding the employer. Tribunal counsel was directed to clarify the status of the employer. [3 pages]

WCAT Decisions Considered: Decision No. 94/90I (1991), 18 W.C.A.T.R. 161 *reld to*; Decisions No. 356 *reld to*, 140/87 *reld to*

DECISION NO. 91/91 (18/11/91) Moore M. Cook Meslin*Medical opinion (osteoarthritis) - Medical opinion (tear) (meniscus) - Osteoarthritis (knee) - Delay (onset of symptoms) - Delay (reporting injury).*

The worker sustained a compensable injury in 1953 when he fell off of his motorcycle. He suffered a broken left wrist as well as extensive cuts and bruises to his left leg, including a five-stitch cut on his left knee. The worker's leg injuries appeared to heal uneventfully. However, in the early 1970s he began to report the presence of pain in his left knee. In 1981 a damaged medial meniscus was removed from the worker's left knee. Arthroscopy performed in 1983 revealed the presence of degenerative osteoarthritis sufficiently advanced that major surgery was required.

It did not occur to the worker that his left knee disability was related to the 1953 accident until a 1987 discussion with a board doctor who was assessing him for a separate right knee disability. The worker did not file a new claim with the Board regarding the left knee or inform his doctor about the 1953 accident until 1987.

Once the worker's doctor learned about the 1953 accident, he described a mechanism by which trauma, such as a contusion to the cartilage of the knee, will not give any problems early on, but will frequently proceed to degenerative changes in the long-term. Evidence in a prior Tribunal decision tended to support that view. However, evidence in yet another Tribunal decision suggested that the type of tear of the medial meniscus suffered by the worker would be caused by degeneration and not by trauma. The opinion of the Tribunal's medical assessor was that the latest information suggested that most degenerative lesions in a joint are the result of traumatic incidents that precede the onset of symptoms by many years.

The Panel found that the delay in the onset and reporting of the worker's symptoms was to be expected medically and was consistent with the injury as described by the worker. The worker was entitled to benefits for his left knee disability. [11 pages]

WCAT Decisions Considered: Decision Nos. 1159/87 not *lold*; 300/89 *consd*

DECISION NO. 484/91 (18/11/91) Moore Robillard Sutherland*Summons - Investigation by Tribunal (pre-hearing).*

The employer requested that all reports, which had been prepared by the doctor who performed surgery on the worker and sent to the worker's representative, be subpoenaed. The Panel constituted itself a Case Direction Panel. After the Panel decided that it had the power to issue such a subpoena, the worker indicated that a subpoena would not be necessary and two reports were later filed. However, the worker asked that the Tribunal: require a meeting between the worker and the doctor so as to obtain a more complete report; subpoena the doctor; or seek further independent medical evidence.

If the worker required a further report from the doctor, he could obtain it without the intervention of the Tribunal. Given the doctor's comprehensive reporting, there was no need to subpoena him. The worker's request for further independent medical evidence could best be determined by the Hearing Panel after it had seen and heard the existing evidence in its entirety. There appeared to be sufficient evidence for a panel to hear the appeal. It would be premature for the Case Direction Panel to order evidence not in existence at this point.

The parties themselves could obtain additional evidence provided that it be filed in accordance with the three week rule. The doctor was not to be subpoenaed to testify at the hearing of this appeal. [5 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to; Decision No. 429I reld to

DECISION NO. 560/91 (18/11/91) Moore M. Cook Jago*Procedure (absent parties).*

The worker was not present for the hearing of his appeal. When contacted later by Tribunal counsel, the worker indicated that his car had broken down six days previously and that he had no means of transportation to Toronto. He indicated that he had not contacted the Tribunal since he assumed the appeal would be decided on the documentary evidence. He also stated that he would like to obtain a representative to represent him at a reconvened hearing.

In the circumstances, the Panel deemed the appeal to be withdrawn without prejudice to the worker's right to appeal again. [4 pages]

DECISION NO. 569/91 (18/11/91) Moore Lebert Nipshagen*Access to worker file, s. 77 (issue in dispute) (absence of appeal).*

The worker appealed the decision of the Board's Access Specialist which granted the employer access to medical documents in the worker's file. At the time that the employer requested access, the worker was objecting to a Board decision that denied him ongoing entitlement to benefits. However, a subsequent Board decision denied the worker's objection to the decision relating to ongoing entitlement to benefits. The worker had not filed an appeal with respect to that decision.

In the latest decision, the issue thus had been resolved against the worker and in favour of the employer. In the absence of an indication of a further appeal by the worker, there was nothing for the employer to dispute. Without an "issue in dispute", as required by s. 77(3) of the Act, there was no basis

or granting access to the documents at this time.

The worker's appeal was allowed. The employer was denied access to the medical documents. [4 pages]

1: 77(3)

CAT Decisions Considered: Decision Nos. 791/88 apld, 389/90 apld

DECISION NO. 772/91 (18/11/91) Newman Shartal Jago

continuing entitlement.

In July 1973 the worker suffered a compensable lumbar strain. In November 1973 he suffered a herniated disc at work and was awarded a 25% pension. In May 1983 he suffered a myofascial strain of the back and was awarded an additional 5% pension. In April 1988 the worker felt a sudden onset of sharp pain in his lower back. He received temporary benefits until July 1989, by which time the Board concluded he had returned to the level of disability recognized by his 30% pension. The worker did not return to work until October 1989 and sought continuing temporary benefits until then. He argued that the April 1988 injury was a "muscle injury" separate and distinct from the previous injuries and therefore was not recognized by his 30% pension.

The worker did suffer a muscle strain in April 1988. However, the May 1983 injury was also a muscle-related injury and it had been recognized by a separate pension award. By July 1989 the worker had returned to the level of disability recognized by his 30% pension. He was not entitled to temporary benefits after that date. [6 pages]

DECISION NO. 293/88 (19/11/91) Kenny Klym Mason (dissenting)

Heart attack (stress) - Presumptions (section 3) (standard of proof) - Medical opinion (heart attack)(stress).

The employer appealed a decision of the Hearings Officer denying entitlement for a heart attack. The worker was a plant protection officer (PPO). He usually worked in a communication centre with another PPO. During the night of January 17/18, there was a fire at the plant. For a time, the safety of three people was unknown. During that shift and again during the January 18/19 shift, there was some concern as to why the worker had not notified the city fire department. The worker suffered the heart attack on January 19. He claimed that it was related to the stress of the fire and the questioning of his response to it.

The majority of the Panel found that the worker was entitled to benefits. The heart attack occurred in the course of employment. The effect of the presumption in s. 3(3) was to change the question that must be asked to whether it has been shown that work was not a significant cause of the heart attack. The decision of the Supreme Court of Canada in *Circle Film v. CBC*, which used a "some evidence" test to rebut a presumption, was distinguished. It was significant that the Court in *Circle Film* did not know why the presumption was included in that form in the legislation whereas the presumption in the Workers' Compensation Act served an important substantive purpose in situations where certain evidence is missing, and that the use was based on the adversarial model of civil litigation rather than the non-adversarial model of workers' compensation.

The majority of the Panel found that the worker suffered acute emotional stress at work. The worker had never had to respond to life-threatening situations or a major fire at work. He was working alone on his shift that night. There was also considerable stress when he felt his capabilities as a PPO were being questioned.

There was medical evidence that over 90% of heart attacks result from thrombosis (blood clots blocking a blood vessel) and that stress does not cause thrombosis. However, it was also possible for heart attacks to be caused by a number of other mechanisms including an increased demand for blood, a decreased supply of blood and neurohumeral imbalance. Acute stress could cause a heart attack in some of these cases without thrombosis.

The worker had major narrowing (90%) of the right coronary artery. He was undergoing severe emotional stress from the time of the fire until the heart attack. There were mechanisms by which stress can cause a heart attack. The majority of the Panel concluded that it had not been shown that work was not a significant contributing factor.

The appeal was dismissed.

The Employer Member, dissenting, found that the events were not sufficiently stressful for an experienced and trained PPO, who in addition was a volunteer firefighter in the community. In all probability, the heart attack was caused by a spontaneous thrombus. [25 pages]

WCAT Decisions Considered: Decision No. 107/88 (1988), 8 W.C.A.T.R. 318 *reld to*; Decision No. 470/88 (1988), 9 W.C.A.T.R. 315 *reld to*; Decision No. 42/89 (1989), 12 W.C.A.T.R. 85 *reld to*
Board Directives and Guidelines: Claims Services Division Manual, s. 1(1)(a), p. 8, Directive 6
Cases Considered: Circle Film Enterprises Inc. v. Canadian Broadcasting Corp. (1959), 20 D.L.R. (2d) 211 (S.C.C.) *distd*

DECISION NO. 289/91R (19/11/91) McCombie M. Cook Preston

Reconsideration - Issue setting.

The worker requested that Decision No. 289/91R be reconsidered. The original decision denied the worker supplementary benefits as he failed to meet the threshold test. He argued that there was a Board policy that workers who were in receipt of temporary benefits as of November 1987 were deemed to have met the threshold test. The worker was receiving temporary benefits at that time.

When an appeal concerns the application of a certain section of the Act, a hearing Panel will consider the whole section. As the threshold test is part of s. 45(5), a panel hearing an appeal concerning temporary supplements under s. 45(5) has an obligation to consider the subsection in its entirety, including whether or not the worker had met the threshold requirement. The request for reconsideration was denied. [4 pages]

WCAT Decisions Considered: Decision No. 72R (1986), 18 W.C.A.T.R. 1 *reld to*; Decision No. 72R2 (1986), 18 W.C.A.T.R. 26 *reld to*; Decision No. 95R (1989), 11 W.C.A.T.R. 1 *reld to*; Decision No. 850/87R (1990), 14 W.C.A.T.R. 1 *reld to*; Decision No 289/91 *reld to*; Pension Assessment Appeals Leading Case Interim Report (1986), 7 W.C.A.T.R. 365 *reld to*

DECISION NO. 792/91 (19/11/91) McCombie Fox Barbeau

Delay (onset of symptoms).

The worker suffered multiple injuries in a 25-foot fall in 1982. The worker appealed a decision of the Hearings Officer denying entitlement for right knee and neck disabilities.

There was a delay in onset of the neck and knee symptoms. However, there was medical opinion that the conditions were compatible with the accident and that the delay in onset of symptoms was not that unusual. The Panel found that the injuries were related to the compensable accident. The appeal was allowed. [6 pages]

DECISION NO. 806/91 (19/11/91) McIntosh-Janis Shartal Seguin*Withdrawal (of appeal).*

The worker was permitted to withdraw his appeal with respect to a Hearings Officer decision that confirmed the level of his provisional chronic pain pension. This would allow the worker to first pursue an appeal from a lower level Board decision concerning his permanent chronic pain pension. The worker could then bring appeals at the Tribunal, concerning both of his chronic pain pensions, together. [3 pages]

DECISION NO. 822/91I (19/11/91) B. Cook Drennan Chapman*Procedure (absent parties).*

The hearing was adjourned in the absence of the worker and his representative. The worker's representative, who had been recently retained, had called about one week before the hearing to ask about an adjournment. He did not put his request in writing before the hearing, as advised by the Scheduling Department.

The representative's behaviour was inexplicable. However, to proceed with the appeal in the absence of the worker and his representative would penalize the worker and prejudice his rights. [4 pages]

DECISION NO. 154/89R (22/11/91) Newman Shartal Meslin*Reconsideration (new evidence) - Ombudsman - Medical report (adjudicative opinion).*

The worker's request to reconsider Decision No. 154/89 was granted on the basis of significant new evidence which became available after the hearing.

The new evidence was acquired as a result of an investigation by the Ombudsman. The Ombudsman wrote to two of the doctors whose evidence was considered by the original hearing panel. The Panel commented on the nature of the questions asked by the Ombudsman. The questions asked for an opinion which could be considered adjudicative in nature. Because of this, the Panel carefully reviewed the report to ensure that it was objective. In this case, the response indicated that a serious and academic approach was taken. There was a clear opinion based on results of a variety of tests. The Panel was satisfied that the report was significant new evidence which may alter the outcome of the decision. [6 pages]

WCAT Decisions Considered: Decision No. 72R2 (1986), 18 W.C.A.T.R. 26 *reld to*; Decision No. 154/89 *reld to*

DECISION NO. 94/91 (22/11/91) Bigras Jackson Preston*Exposure (asbestos).*

The worker appealed a decision of the Hearings Officer denying entitlement for asbestosis which the worker related to exposure to asbestos when the building in which he worked was being renovated.

There was no evidence that the worker was exposed to asbestos at work. The appeal was dismissed. [6 pages]

DECISION NO. 472/91 (22/11/91) Newman Robillard Preston

Disablement (change in work).

The worker appealed a decision of the Hearings Officer denying entitlement for a right shoulder disability which the worker related to his work during a six-month period after he returned to work from a left shoulder disability. During that time, he was trying to protect his left shoulder and he made arrangements with a co-worker to trade jobs periodically. The co-worker's job required more use of the right shoulder than the left.

Considering evidence of onset of symptoms during the period in question, the Panel found that work was a significant contributing factor to the right shoulder disability. The appeal was allowed. [6 pages]

DECISION NO. 523/91I (22/11/91) Sandomirsky Shartal Apsey

Adjournment (additional issues).

The worker was appealing denial of a supplement under the transitional provisions in s. 135(4) of the Act. The Panel found that it had jurisdiction to consider entitlement to a supplement under s. 135(2). The Panel was going to consider entitlement under all aspects of s. 135. However, the worker received notice from the Board that sponsorship in a training programme had been approved and that a decision regarding entitlement under s. 135(2) would be forthcoming. In the circumstances, the appeal was adjourned. [5 pages]

DECISION NO. 704/91I (22/11/91) Moore Shartal Meslin

Adjournment (additional issues) - Issue setting.

The worker was appealing a decision of the Reinstatement Officer finding that the employer did not violate s. 54b when it terminated the worker's employment. The worker submitted that the issues to be determined included both whether the job to which the worker returned involved more than the essential duties of the pre-accident job and, if not, then whether the worker was capable of performing the essential duties of the pre-accident job. The employer submitted that the correctness of the notice of fitness was not considered by the Reinstatement Officer.

The Panel identified the broad issues that have to be determined on a re-employment appeal and the specific issues that had to be determined in this case, which included the correctness of the notice of fitness. The hearing was adjourned. [11 pages]

WCAT Decisions Considered: 372/91 *reld to*

DECISION NO. 796/91I (22/11/91) McIntosh-Janis Shartal Shuel

Adjournment (additional medical evidence).

The worker was appealing denial of entitlement. The Panel was concerned about the absence of evidence regarding possible non-organic disability. The hearing was adjourned. The Panel directed the Tribunal Counsel Office to arrange the necessary assessments. [4 pages]

DECISION NO. 407/91I (25/11/91) Moore Lebert Meslin

Adjournment (additional medical evidence) - Cancer (esophagus) - Mining (gold) - Board Directives and Guidelines (cancer) (mining) (gold).

The worker's widow appealed a decision of the Hearings Officer denying entitlement to dependency benefits for the worker's death from cancer. The worker was a gold miner from 1932 to 1953. The Hearings Officer found that the worker did not come within Board guidelines for entitlement since the primary site of the cancer was not the trachea, bronchus or lungs but, rather, the esophagus.

On the evidence, the Panel found that the primary site of the worker's cancer was the esophagus and that, therefore, the worker did not come within Board guidelines or Schedule 3. However, there could still be entitlement on a disablement basis if it could be shown that the worker's fatal illness was caused by an injuring process associated with employment.

The Panel reviewed evidence indicating that there may be a relationship between stomach cancer and gold mining. The Panel adjourned the hearing and directed the Tribunal Counsel Office to request submissions from the Board as to why its gold mining policy is limited to cancer of the trachea, bronchus and lung. In addition, further medical and epidemiological evidence should be obtained. [19 pages]

WCAT Decisions Considered: Decision No. 94/87 (1989), 11 W.C.A.T.R. 20 consd; Decision No. 257/89 (1990), 14 W.C.A.T.R. 87 consd; Decision No. 809/88 consd

Board Directives and Guidelines: Operational Policy Manual, Document no. 04-04-08; Lung Cancer - Gold Miners, Board Minute 5, August 29, 1991, p. 5471

DECISION NO. 434/91 (25/11/91) Moore B. Cook Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 486/91 (19/11/91) McIntosh-Janis Jackson Sutherland

Assessment of employers (retroactivity) - Board Directives and Guidelines (assessment of employers) (reclassification) (retroactivity).

The employer had been classified since 1979 under the warehousing rate group. A Board audit in mid-January 1989 resulted in a reclassification to the trucking rate group, which had an assessment rate twice as high as that for warehousing. The employer accepted the reclassification but appealed that it was made retroactive to January 1, 1987. The employer argued that January 1990 was the appropriate date for the reclassification to take effect.

In this case the Board had applied its usual policy of making the reclassification retroactive two years. That policy also provides that under "special circumstances" the reclassification can be made effective January 1 of the current year (in this case 1989). At the time of reclassification, the employer had already completed negotiating a collective agreement (which took effect January 1, 1989) and had finalized the rates that it guaranteed to its customers for 1989. The employer argued that this constituted

special circumstances as it could not re-adjust these figures to reflect the added expense of the reclassification.

The Panel found that there were special circumstances in this case, namely the lack of notice to the employer of the Board's intended reclassification and the Board's misapprehension of the facts underlying its main reason for choosing the retroactivity date that it did.

The employer's classification had previously been an issue, but it was entitled to assume that the Appeal Board's 1980 decision, which affirmed its warehousing classification, was correct. In such circumstances "special circumstances" applied.

Although concerns were raised about the classification by the Appeal Board as early as October 1986, the Board did not communicate any concerns about the proper classification to the employer until two days before the audit in January 1989. If the employer had known about the potential reclassification, its failure to incorporate the possible effects of the reclassification in its collective agreement or its guaranteed rates would arguably have been at its own peril. However, the Board's actions effectively denied the employer any notice of a reclassification that would double its assessments for all future years and two years prior.

A major reason for the Board's choice of the two year retroactive reclassification was its assumption that, after the employer acquired a freight forwarding licence in 1986, there had been a substantial change in its business. In fact, the legal licensing requirements had changed, but the nature of the employer's business had not. The employer had never obtained the transportation licence that the Board thought it had obtained.

It was appropriate to apply the Board's "special circumstances" policy and make the effective date of the reclassification January 1, 1989. The employer had shown no circumstances to justify forward-dating the effective date of the reclassification to January 1, 1990. [11 pages]

WCAT Decisions Considered: Decision No. 124/87 (1988), 10 W.C.A.T.R. 43 distd; Decision No. 131/87 (1989), 10 W.C.A.T.R. 51 distd; Decision No. 576/87 (1987), 6 W.C.A.T.R. 163 distd; Decision No. 585/87 distd
Board Directives and Guidelines: Operational Policy Manual, Document no. 08-03-05

DECISION NO. 833/91L (25/11/91) Strachan Fox Chapman

Leave to appeal (good reason to doubt correctness) (credibility).

The worker sought leave to appeal a decision of the Appeal Board denying entitlement for a left arm disability. The worker claimed that she felt an immediate onset of pain while helping a chef lift a pot and that she reported the incident to the chef. The chef denied that there was any such evidence and a co-worker stated that the worker had complained of arm pain before the date of the alleged incident.

The Appeal Board made a finding of credibility and accepted the chef's version of events which was supported by the co-worker. There was no good reason to doubt the correctness of the Appeal Board's decision. None of the new medical information was significantly different than that which had been before the Appeal Board. Leave to appeal was denied. [7 pages]

DECISION NO. 162/91 (26/11/91) Robeson Robillard Barbeau

Aggravation (preexisting condition) (rheumatoid arthritis).

The worker broke his left elbow in a compensable accident in February 1981. He was off work for seven

weeks and then returned to his regular job, which involved a lot of heavy lifting, in March 1981. Within three months of his return to work, the worker experienced swelling in his left elbow which was relieved by draining fluid. This swelling and draining of the left elbow continued four or five times a year until October 1985, when the worker's left olecranon bursa was removed. In June 1987 the worker underwent a left total elbow replacement. The worker sought ongoing entitlement for benefits after March 1981.

The worker was diagnosed in 1973 as having rheumatoid arthritis that affected both elbows. However, he had performed his regular duties up until the 1981 accident. There was a dramatic difference in the progression of the rheumatoid arthritis in the worker's left and right elbows after the accident. In October 1986 a medical report described the worker's right elbow as normal, while the left elbow had advanced arthritic change. By June 1987 the left total elbow replacement was required.

The worker's preexisting rheumatoid arthritis condition was aggravated by the February 1981 accident. The worker continued to be disabled, by the left elbow condition, after March 1981 as a result of the compensable accident. He was entitled to benefits. [15 pages]

WCAT Decisions Considered: Decision No. 470 (1990), 15 W.C.A.T.R. 1 consd; Decision Nos. 470L refd to, 936/87 consd
Board Directives and Guidelines: Claims Services Division Manual s. 108(2), p. 235, Directive 1

DECISION NO. 718/91 (26/11/91) Bigras Rao Nipshagen

Asthma - Hyperventilation.

The worker appealed a decision of the Hearings Officer denying entitlement for a respiratory condition. Considering the medical evidence, the Panel found that the worker was suffering from asthma and hyperventilation. Exposure at work to various chemicals and fumes caused an irritation which aggravated the worker's preexisting condition. The appeal was allowed. [12 pages]

WCAT Decisions Considered: 615/90 refd to

DECISION NO. 537/90 (27/11/91) Hartman Higson Preston

Continuing entitlement.

The worker appealed a decision of the Appeal Board denying entitlement for a back condition subsequent to November 1978. On the evidence, the worker was not disabled by a back condition related to the compensable accident subsequent to November 1978. The appeal was dismissed. [8 pages]

WCAT Decisions Considered: 537/90L refd to

DECISION NO. 549/90 (27/11/91) Strachan McCombie Nipshagen

Interest - Jurisdiction, Board (interest) - Board Directives and Guidelines (interest) - Discretion, Board (interest) - Retroactivity - Overruling - Legal precedent - Jurisdiction, Tribunal (interest) - Supplements, older worker.

The worker appealed a decision that denied him entitlement to interest on the arrears granted by the Board on his older worker supplement.

The worker was injured in 1976 and was awarded a pension in 1979. Entitlement to older worker supplements was introduced by a legislative amendment that came into effect in April 1985. The worker was awarded his supplement in 1988, retroactive to April 1985. The Board implemented an interim and a final policy, in January 1989 and January 1990 respectively, that covered the payment of interest. Under these policies, the worker did not qualify for payment of interest on his award because of the date limitations set out in the policies. Also, supplements were excluded from the types of award for which the policies specified that interest was payable.

Tribunal Decision Nos. 206A and 486/89 found, based on the then prevailing judicial trends, that the Act implicitly authorized the Board to make interest payments. Indeed, Decision No. 206A found that the Board was obligated to pay interest. The main judicial decision relied on by the Panel in Decision No. 206A was *Zaidan Group v. City of London*, which was subsequently reversed by the Ontario Court of Appeal (but a further appeal to the Supreme Court of Canada was pending).

The provisions of s. 3(1) and s. 39 were not sufficient to show a clear legislative intention to pay interest on benefits. Absent such clearly evident intent, the resulting unfairness could not be remedied by adjudicators filling in the gaps in the legislation. The law as currently expressed by the Court of Appeal required that the inequity be remedied by the Legislature.

Since the law of Ontario with respect to the Board's obligation to pay interest was still evolving at the time of Decision No. 206A, that decision could not be considered an "overruling" because it was not a decision necessitated by developments in the law of Ontario. There was thus no mandatory power requiring the Board to pay interest.

However, the absence of a specific legislative provision requiring the payment of interest did not preclude the Board from paying interest on overdue benefits where the Board considered it appropriate. Payments to workers contemplated by ss. 3 and 39 must be on a timely basis to be effective. If payment is not timely, the Board should determine how the compensation is to be calculated to compensate for failure to make timely payments. Inherent in the Board's power under s. 39 to compute the compensation payable, is a discretion to establish the fair economic value of the compensation at the time that it is computed by the Board. The Board thus has discretion to pay interest as part of the compensation, provided it does so in accordance with the tenets of good public administration.

In fixing the dates for limiting claims with respect to which interest would be paid under its interim and final policies, the Board was attempting to balance the financial integrity of the Accident Fund against maintenance of a fair economic value for benefits. This was a reasonable exercise of the Board's discretion in accordance with the tenets of good public administration. There was no reason for interfering with the Board's exercise of its discretion. (There was not, however, any logical or equitable basis for excluding supplements from the types of awards for which interest could be paid.)

The appeal was dismissed. [30 pages]

Ss: 3(1), 39

WCAT Decisions Considered: Final Decision No. 2 (1987), 4 W.C.A.T.R. 1 *reld to*; Decision No. 206A (1988), 9 W.C.A.T.R. 4 *not folld*; Decision No. 915A (1988), 7 W.C.A.T.R. 269 *reld to*; Decision No. 467/89 (1990), 14 W.C.A.T.R. 117 *not folld*

Board Directives and Guidelines: Interim Interest Policy, Board Minute No. 10, January 6, 1989; Operational Policy Manual, Document no. 05-01-08
Cases Considered: Zaidan Group Ltd. v. London (City) (1990), 71 O.R. (2d) 65 (Ont. C.A.) apld; Windsor Roman Catholic Separate School Board v. Windsor (City) (1988), 64 O.R. (2d) 241 (Ont. C.A.) apld; Canadian Broadcasting Corp. v. Broadcast Council of C.U.P.E., Local 667 (1987), 76 N.R. 155 (Fed. C.A.) distd; Lewis v. Todd (1980), 115 D.L.R. (3d) 257 (S.C.C.) consd; Canada (Minister of Transport) v. Phoenix Assurance Co Ltd. (1973), 1 O.R. (2d) 113 (Ont. C.A.) distd; Review of Decisions No. 915 and 915A (1990), 15 W.C.A.T.R. 245 (WCB Bd. of Directors) refd to

DECISION NO. 336/91 (27/11/91) Hartman Fuhrman-Thompson Chapman

Continuity (of symptoms).

The worker suffered pain in his shoulder in February 1983, for which he lost no time. The worker appealed a decision of the Hearings Officer denying entitlement for a shoulder condition in 1986. Considering lack of continuity, the Panel found that the worker's condition in 1986 was not related to the compensable accident in 1983. The appeal was dismissed. [6 pages]

DECISION NO. 404/91 (27/11/91) Strachan M. Cook Apsey

Independent operator (truck driver) - Worker (test) (business reality) - Issue setting.

W Co. appealed a decision of the Hearings Officer finding that certain owner/operators retained by W Co. to haul sand and gravel were workers for the purposes of the Act. W Co. was wholly owned by M. Depending on the amount of work available, W Co. would retain the services of other owner/operators to haul gravel. All of these other owner/operators owned their own tractors. Some also owned their own trailers. Others rented a trailer from S Co., which was owned by T, M's son-in-law. Those who rented the trailer, signed an agreement dealing with the supply of service and equipment by the owner/operator to W Co. and the rental and maintenance of the trailers. The Hearings Officer found that the owner/operators who owned their own trailers (and did not sign any agreement) were independent operators but that the ones who rented the trailers (and signed the agreement) were workers.

In a preliminary matter, the Panel decided that all the issues before the Hearings Officer were also before the Panel. Therefore, the status of the owner/operators who did not sign an agreement was also in issue.

Applying the business reality test, the Panel found that the owner/operators were independent operators. They had significant capital investment, they worked for W Co. on an "as needed" basis and hauled for other brokers or for themselves at other times, W Co. and S Co. received percentages of revenue, they had significant discretion as to how and when the work was performed, and W Co.'s role should be viewed as that of a broker.

The appeal was allowed. [14 pages]

WCAT Decisions Considered: 945/89 refd to, 404/91 refd to

Cases Considered: Marked Investigations Ltd. v. Minister of Social Security, [1968] 3 All E.R. 732 refd to

DECISION NO. 656/91 (27/11/91) Moore Jackson Apsey

Penalties - Board Directives and Guidelines (penalty assessments) (improved record).

The employer appealed a decision of the Hearings Officer confirming a penalty assessment for the years 1985-87. The employer was part of a corporate family that included several businesses. The employer had workers in two rate groups. Because of the complexity of payroll allocation, assignment of reported accidents to rate groups was done arbitrarily. The employer had accident rates and costs above the rate group average in 1986 and 1987. By the end of 1987, the employer had a lifetime deficit of about \$16,000. The other rate group had a lifetime surplus of about \$200,000. The penalty assessment was about \$58,000.

Board policy provides that the purpose of penalty assessments is to pressure employers to improve safety programmes and to ensure that individual employers do not impose an unfair burden on the rate group.

In this case, the employer received the assessment in February 1989. Safety audits showed a score of 45.4% in September 1989 (well below the acceptable level of 65%), 66.1% in January 1990, and 98.7% in July 1991. This shows that the employer took immediate and effective measures to improve safety. In addition, the employer had a lifetime deficit of only \$16,000, compared with the penalty of \$58,000. Further, the employer had since joined the NEER programme and has changed a surcharge into a rebate between 1988 and 1991.

The Panel concluded that the purpose for which the penalty was imposed had been achieved. The penalty should be eliminated. The appeal was allowed. [8 pages]

Regulations Considered: Reg. 951, s. 6

Board Directives and Guidelines: Operational Policy Manual, Document no. 08-06-05

DECISION NO. 658/91L (27/11/91) Bigras Robillard Seguin

Leave to appeal (good reason to doubt correctness) (consideration of evidence).

The worker applied for leave to appeal a decision of the Appeal Board denying entitlement for a back disability. The Appeal Board decision appeared to be based on a lack of corroboration of an accident by a co-worker who worked near the worker. However, the worker and co-worker did not necessarily work at the same pace and often were not near each other. Therefore, the fact that the co-worker was unaware of an accident should not have been given the weight that it was by the Appeal Board.

Leave to appeal was granted. [9 pages]

DECISION NO. 761/91 (27/11/91) Hartman Fox Jago

Hernia (inguinal) - Benefit of the doubt - Presumptions (section 3).

The worker appealed a decision of the Hearings Officer denying entitlement for a left inguinal hernia. The hernia occurred as the worker sneezed while rising from a crouched position using a twisting motion.

There was evidence that the hernia could have been caused by the sneeze or the rising with the twisting motion. There was no evidence that the sneeze was work-related. Applying the benefit of doubt in favour of the worker, the Panel found that the hernia was compensable. In addition, since the accident occurred in the course of employment, there was a presumption that it arose out of employment. The presumption was not

rebutted since the Panel could not conclude that the sneeze alone was the cause of the hernia.
The appeal was allowed. [7 pages]

**DECISION NO. 764/91 (27/11/91) Strachan; Rao; Meslin
Sylvester v. Cullen**

Section 15 application; Election; Subrogation; Time limits (election); Jurisdiction, Tribunal (appealable issue); Jurisdiction, Tribunal (election); Jurisdiction, Tribunal (final decision of Board) (refusal to refer to Hearings Officer); In the course of employment (parking lots); In the course of employment (work relatedness test); In the course of employment (employer's premises).

The worker was walking to her car in the employer's parking lot after finishing her shift when she was struck by a motor vehicle driven by another worker of the employer who was also leaving. The accident occurred in February 1988. In January 1989, the worker elected to receive workers' compensation benefits. The Board commenced a civil action in her name. Subsequently, the worker attempted to re-elect to pursue a civil action but the Director of Legal Services at the Board refused.

The decision of the Director of Legal Services was a final decision of the Board as there was no further appeal possible at the Board. A decision of the Board regarding election is one over which the Tribunal has jurisdiction on appeal within s. 86g(1)(b). The decision comes within a broad interpretation of the word "entitlement". A decision under s. 8 deals with entitlement to a potential benefit regarding recovery in excess of compensation payments.

The worker implicitly elected to receive benefits when applying for and receiving benefits. This was confirmed by the election in January 1989. Although this was beyond the three month time limit in s. 7, the Panel found, from the concluding words of s. 7(2), that there was discretion to extend the period.

There should be exceptional circumstances before a worker is allowed to change an election. Otherwise, there would be a significant degree of uncertainty in the system. In this case, there were no exceptional circumstances. The worker's application to re-elect and assume control of the civil action was denied.

On the merits of the defendant's s. 15 application, the issue was whether the defendant was in the course of employment. The Panel reviewed decisions regarding the test for determining whether a worker is in the course of employment while in the employer's parking lot. There were some decisions which favoured a work relatedness test. However, the majority of decisions favoured a premises test and virtually ignored the Board policy regarding instruments of added peril. Although the Panel preferred a work relatedness test, the need for consistency took precedence. The Panel followed the majority of Tribunal decisions and, applying a premises test, found that the defendant was in the course of employment. Accordingly, the worker's right of action was taken away. [27 pages]

Ss: 7, 8(1), 86g(1)(b)

WCAT Decisions Considered: Decision No. 150 (1986), 1 W.C.A.T.R. 201 consd; Decision No. 547/87 (1988), 8 W.C.A.T.R. 160 consd; Decision No. 1123/87 (1988), 8 W.C.A.T.R. 274 consd; Decision No. 282/90 (1990), 17 W.C.A.T.R. 117 refd to; Decisions No. 674/89 consd, 3/90 consd, 531/90 consd

Board Directives and Guidelines: Operational Policy Manual, Document no. 03-02-02

Cases Considered: Cullen v. Sylvester (S.C.O. Master) (June 6, 1990) consd; MacIntosh v. Gzowski (1980), 27 O.R. (2d) 151 (C.A.) consd; Meyer v. Ontario (Workers' Compensation Board) (1986), 15 O.A.C. 202 (Div. Ct.) refd to; Ontario (Minister of Health) v. Clements (1989), 70 O.R. (2d) 569 (Dist. Ct.) refd to; Toronto Railway Co. v. Hutton (1919), 50 D.L.R. 785 (S.C.C.) refd to

DECISION NO. 805/91I (27/11/91) McIntosh-Janis Shartal Seguin

Adjournment (additional evidence).

At the hearing, the worker sought to introduce two medical reports and to adduce oral evidence from the two authors of those reports, contrary to the three week rule. The employer sought to introduce a written statement from the worker's supervisor, also contrary to the three week rule.

The Panel agreed to accept the evidence, but the appeal was adjourned so that the parties and the hearing panel could consider the new evidence. Tribunal counsel was directed to produce an addendum to the Case Description containing the new documentary evidence and a summary of the oral evidence that the worker would seek to adduce from the doctors. This Panel was not seized. [4 pages]

DECISION NO. 99/91A (28/11/91) McIntosh-Janis; Robillard; Jago

Jurisdiction, Tribunal (costs); Jurisdiction, Board (costs); Statutory interpretation (necessary implication); Words and phrases (benefits, s. 3(1)).

The employer's appeal from a decision awarding the worker entitlement to benefits was dismissed. The worker then requested that the Panel direct that the employer pay the costs of the worker's response to the appeal. The only issue in this case was the Tribunal's power to order the payment of costs.

There is no provision in the Act either expressly granting the Tribunal the power to award costs or expressly prohibiting it from awarding costs. The Act had expressly granted the Board the power to award costs until 1973, when that section was repealed.

Section 81(c) of the Act enables the Board (and by virtue of s. 86m, the Tribunal) to allow claimants travelling and living allowances. The Panel rejected the argument that the inclusion of this specific provision, that governs very limited specified available costs, should be interpreted as an exhaustive listing of all costs to which a party is entitled. It did not, in itself, preclude an implication of a power in the Tribunal to order costs to a successful party of record.

The term "benefits" in s. 3(1) is not broad enough to include the right to the payment of costs. The failure to pay costs would not involve a breach by the Board of any requirement of the Act.

The courts have tended to adopt a restrictive view of the power of administrative tribunals to award costs generally. They have tended to require express and unambiguous statutory language conferring the power to award costs before upholding awards of costs granted by administrative tribunals.

The removal in 1973 of the express statutory power to order costs indicated that the Board, and by implication the Tribunal, does not now have the statutory power to order that costs be payable to a party. The Legislature has expressly granted other administrative tribunals the power to order costs in their enabling statutes. If it had intended the Tribunal to have such authority, it would have done the same in the Act.

Even in the absence of express statutory provisions, an administrative tribunal has all those powers which, by implication, are reasonably necessary for the accomplishment of its intended statutory objective. There was no evidence of practical necessity for implying a general costs power in the Tribunal. The Tribunal, since its inception in 1985, and the Board since the 1973 statutory amendment, had held innumerable hearings without exercising any jurisdiction in respect of costs.

It would be counterproductive to the no-fault statutory insurance scheme under the Act to import into it a "winner/loser" concept, with its punitive elements, by implying a power in the Tribunal to order costs. Such a power could have a serious chilling effect on parties exercising their legitimate rights of appeal.

The Tribunal does not have the power to order one party in an appeal to pay the other party's costs incurred in preparing for the appeal. [25 pages]

Ss: 3(1), 81(c), 74(1) R.S.O. 1970

WCAT Decisions Considered: Decision No. 46 (1986), 3 W.C.A.T.R. 33 refd to; Decision No. 64 (1986), 2 W.C.A.T.R. 19 refd to; Decision No. 174 (1986), 2 W.C.A.T.R. 96 refd to; Decision No. 206A (1988), 9 W.C.A.T.R. 4 distd; Decision No. 434 (1987), 4 W.C.A.T.R. 183 refd to; Decision No. 99/91 (1991), 18 W.C.A.T.R. 293 refd to; Pension Assessment Appeals Leading Case Interim Report (1986), 7 W.C.A.T.R. 365 refd to; Decision Nos. 374/87 refd to, 678/87 refd to; 1041/89 refd to; 729/90I refd to Cases Considered: Reference re National Energy Board Act, (1987), 19 Admin. L.R. 301 (Fed. C.A.) apld; Bell Canada v. C.R.T.C., (1986), 17 Admin L.R. 205 (S.C.C.) consd; Regional Municipality of Hamilton-Wentworth v. Hamilton-Wentworth Save the Valley Committee, (1985), 15 Admin. L.R. 86 (Ont. Div. Ct.) consd; Franko v. Kornatz, (1982), 29 C.P.C. 38 (Ont. H.C.J.) consd; Repac Construction & Materials, [1976] O.L.R.B. Rep. October 610 (O.L.R.B.) consd

DECISION NO. 307/91 (28/11/91) McCombie Robillard Jago

Carpal tunnel syndrome - Preexisting condition (thoracic outlet syndrome).

The employer appealed a decision entitling the worker to benefits for carpal tunnel syndrome. The worker was employed with the accident employer for only five weeks, but for three of those weeks he worked long hours pulling electrical cables on a construction site. The worker had suffered from thoracic outlet syndrome ten years previously. The employer argued that the worker had suffered a recurrence of this previous condition.

Though the symptoms of carpal tunnel syndrome and thoracic outlet syndrome can sometimes be confused, in this case there was electronic diagnostic confirmation of the carpal tunnel syndrome diagnosis and surgery performed to relieve the carpal tunnel syndrome was successful. Thoracic outlet syndrome does not cause carpal tunnel syndrome.

The medical evidence indicated that there are circumstances where short-term use of the wrists can be compatible with carpal tunnel syndrome. There were medical opinions supporting the contention that the worker's carpal tunnel syndrome arose from the work. The appeal was dismissed. [7 pages]

DECISION NO. 802/91 (28/11/91) Hartman Jackson Chapman

Jurisdiction, Tribunal (section 21) - Medical examination (section 21) (medical tests) - Words and phrases (medical examination, s. 21) - Words and phrases (medical practitioner, s. 21).

The employer made a request for the worker to attend at a private organization for a "functional abilities evaluation" by an occupational therapist. The worker applied for an order stating that he was not required to attend.

The employer's request that the worker attend for the functional abilities evaluation was not one which fell within the circumstances contemplated by s. 21. The functional abilities evaluation was not a "medical examination" nor was the occupational therapist a "medical practitioner". In any event, it would be pointless to make an order in this case as the worker had already attended for the evaluation. No statutory purpose would be served by the order.

The hearing did not proceed, on the basis that the Panel was not satisfied it had the jurisdiction to do so. [4 pages]

Ss: 21

WCAT Decisions Considered: Decision No. 850/87 consd

DECISION NO. 821/91 (28/11/91) Onen; Jackson; Shuel

Medical examination (section 21).

The worker was not required to attend a medical examination by a doctor selected by the employer. The employer wanted the examination to determine the worker's capacity to return to work. However, the worker was still totally disabled and about to undergo surgery. As such, it was premature to order the examination. [5 pages]

DECISION NO. 912/90 (29/11/91) Ellis; Higson; Barbeau

Fibromyalgia.

Pursuant to Decision No. 912/90I, the Panel obtained and reviewed medical reports to determine whether the worker was suffering from fibromyalgia or chronic pain. On the evidence, the Panel found that the worker was suffering from fibromyalgia and, therefore, was entitled to benefits without restriction on retroactivity. [5 pages]

WCAT Decisions Considered: Decision No. 912/90I (1991), 17 W.C.A.T.R. 310 *reld* to

DECISION NO. 928/90 (29/11/91) McIntosh-Janis; Drennan; Chapman

Psychotraumatic disability; Depression.

The worker suffered compensable accidents in April 1969, December 1973, December 1974 and September 1978. The worker appealed a decision of the Hearings Officer denying entitlement to benefits for a psychotraumatic disability which the worker related to the cumulative effect of the four accidents.

The preponderance of medical evidence supported the conclusion that the worker was suffering from post-traumatic neurosis with depressive overtones. The condition was related to his physical disability and to non-medical socio-economic factors, the majority of which were clearly related to the compensable back condition.

The Panel found that the worker had recovered from his first two accidents. The psychotraumatic disability was related to the third accident, for which he was awarded a pension and after which he could no longer do construction work. The condition was further aggravated by the fourth accident. The appeal was allowed. [10 pages]

DECISION NO. 81/91R (29/11/91) Kenny; B. Cook; Apsey

Reconsideration; Commutation (small amount).

The worker applied to vary Decision No. 81/91. In Decision No. 81/91, the hearing panel granted a partial commutation of the worker's pension. Since the monthly payment on the remaining pension was only \$22, the worker wanted the remainder commuted so that he could use it to pay for car insurance and start an RRSP.

In addition to the partially commuted pension, the worker had another pension from which he was receiving monthly payments of \$107. Together, the monthly payment was not insubstantial. This reliable source of income

should be maintained.

The application was denied. [4 pages]

WCAT Decisions Considered: Decision No. 69/89 (1989), 12 W.C.A.T.R. 172 refd to; Decisions No. 386/89 refd to, 81/91 refd to, 293/91 refd to

DECISION NO. 121/91 (29/11/91) Bradbury; Beattie; Barbeau

Angina pectoris; Disablement (strenuous work); Medical opinion (angina pectoris) (stress).

An underground miner suffered multiple injuries during a cave-in in January 1984. In December 1984, he returned to modified work. In February and March 1985, he had to lift and clean heavy drill bits. In March 1985, he had an angina attack. He was diagnosed with pre-infarction angina and underwent bypass surgery. The worker appealed a decision of the Hearings Officer denying entitlement for the heart condition.

The worker had a preexisting heart condition. The Panel accepted medical evidence that the severe emotional stress of the cave-in was not a significant contributing factor to the angina attack in 1985. However, the strenuous work performed in the weeks prior to the attack was a significant contributing factor in development of the worker's unstable angina and the need for bypass surgery. The appeal was allowed. [8 pages]

DECISION NO. 408/91 (29/11/91) Hartman; Beattie; Barbeau

Delay (onset of symptoms).

The worker suffered a low back injury in a compensable accident in 1982. The worker appealed denial of entitlement for a shoulder and neck disability and denial of a pension for psychotraumatic disability or chronic pain.

On the evidence, the Panel found that the worker did not suffer a shoulder or neck injury in the accident. Further, there was insufficient evidence to establish entitlement for non-organic disability. The appeal was dismissed. [7 pages]

DECISION NO. 755/91 (29/11/91) Singh; Robillard; Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 756/91 (29/11/91) Singh; Robillard; Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 757/91 (29/11/91) Singh; Robillard; Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 758/91 (29/11/91) Flanagan; Shartal; Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 759/91 (29/11/91) Flanagan; Shartal; Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 760/91 (29/11/91) Flanagan; Shartal; Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a number of personal references which were not relevant. [3 pages]

DECISION NO. 797/91 (29/11/91) Kenny; Robillard; Nipshagen

Aggravation (preexisting condition).

The worker suffered back pain in July 1987 while not at work. He claimed that the condition was related to accidents at work or to the nature of his work. The worker appealed a decision of the Hearings Officer denying entitlement for the back condition.

On the evidence, the worker had an underlying structural weakness that was congenital and/or degenerative in nature. Given this underlying instability, certain movements which put stress on the worker's back were more likely to cause episodes of acute back pain.

In this case, the underlying condition was not work related and the incident that caused the worker to stop working did not occur at work. Therefore, neither the underlying condition nor the aggravation was compensable.

The appeal was dismissed. [8 pages]

DECISION NO. 868/91I (29/11/91) McIntosh-Janis; Jackson; Chapman

Adjournment (addition of representative).

The hearing of an employer's appeal regarding a penalty assessment was adjourned to allow the employer's new representative to familiarize himself with the file. [3 pages]

DECISION NO. 784/91 (02/12/91) McCombie; Jackson; Jago

Delay (onset of symptoms); Downside risk.

The worker suffered a low back injury in 1975 for which he was awarded a 30% pension. The worker appealed denial of a pension for left leg disability and denial of entitlement for a shoulder disability.

The Board found that the leg disability was referred pain from the back. An appeal regarding the pension for the leg disability implicitly challenged the award for the back. It would be possible for the Panel to find that the pension should be less than 30%. The worker decided to withdraw the appeal on this issue.

On the issue of entitlement for a shoulder condition, the Panel found that the condition was not related to the compensable accident, considering delay in onset of symptoms.

The appeal was dismissed. [6 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 refd to

DECISION NO. 814/91 (02/12/91) Sutherland; Robillard; Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 815/91 (02/12/91) Sutherland; Robillard; Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. The worker submitted that the documents should not be released since they did not form the basis for the original decision. The Panel noted that the test was not whether the documents were used to make the original decision but, rather, whether they went to the merits of the issue in dispute. [3 pages]

DECISION NO. 816/91 (02/12/91) Sutherland; Robillard; Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 866/91 (02/12/91) Sandomirsky; Lebert; Preston

Access to worker file, s. 77 (issue in dispute).

Access to the worker's file was denied since there was confusion as to the issue in dispute. [3 pages]

DECISION NO. 867/91 (02/12/91) Sandomirsky; Lebert; Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 871/91 (02/12/91) Sandomirsky; Lebert; Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a reference which was not relevant. [3 pages]

DECISION NO. 743/90 (28/11/91) Onen; B. Cook; Ronson

Pensions (assessment) (ankle); Supplements, temporary (wage loss).

The worker suffered a burn injury to his ankle. Skin grafting was carried out, but the worker continued to experience pain and was only capable of performing modified work at a slight wage loss. He was receiving a 4% pension. The worker sought supplementary benefits.

Temporary supplements can be awarded where the worker has suffered a reduction in earning capacity significantly greater than would be experienced by the average worker with the same type of injury. As a worker's pension award should reflect the usual level of impairment that would be expected in the average worker with the same type of injury, a worker's pension level must be accurate before entitlement to supplementary benefits can be properly determined. The worker consented to the Panel considering the accuracy of his pension, rather than returning to the Board for reassessment.

The worker's existing 4% pension reflected only his organic disability. However, he suffered from a mixture of organic disability and chronic pain. The Panel applied the organic rating schedule, but took into account both the organic and non-organic components of the worker's injury. The worker experienced persistent pain that led to restrictions in standing, walking and participation in recreational activities. He was entitled to an 8% pension (two-thirds of the 12% rating that the Schedule prescribes for a fully immobile ankle). Pursuant to Board policy, the 4% increase due to chronic pain could be applied retroactively only back to March 27, 1986.

During the period in question, the rates of pay applicable to the worker's pre-accident job were anywhere from 5 cents per hour to 53 cents per hour higher than those for his modified duties. These differences did not represent a significant reduction in earning capacity. The worker was at all times employed at work paying in excess of 90% of his pre-accident earnings. The worker was not entitled to supplementary benefits. [11 pages]

DECISION NO. 207/91 (28/11/91) Newman; Shartal; Apsey

Pensions (assessment) (whole person concept); Jurisdiction, Tribunal (final decision of Board).

The worker appealed the confirmation of his pension at the 35% level. His pension award consisted of 20% for organic disability and 15% for non-organic disability. The Board had never assessed the worker for chronic pain or fibromyalgia. The Hearings Officer only considered the pension rating with respect to disability of organic and psychotraumatic origin.

Where it is difficult to divide cases into categories of "organic" and "non-organic" disability, it is preferable to consider the whole person. The Hearings Officer dealt with both the physical and emotional aspects of the worker's disability. The evidence available to the Tribunal was comprehensive. The Tribunal had jurisdiction to consider the adequacy of the permanent disability award in recognition of all aspects of the worker's disability.

In this case it was virtually impossible to separate the organic from the non-organic disability. The Panel feared that the separation of the worker's complaints into these two categories had resulted in a failure to appreciate the impact that this disability had upon him, as a whole person.

The worker suffered from intense pain in his low back and legs, with significant limitation in movement. He was unable to walk or even rest comfortably. The worker's tendency to over-react to the disability contributed to the depth of his experience with the pain. He suffered from a conversion disorder resulting in loss of sensation in the right side of his body. The worker also suffered from fibromyalgia that had developed into an additional disabling condition.

The worker's 35% pension rating did not adequately reflect the usual degree of impairment resulting from the combined disabilities. The worker's pension rating was increased to 45%. [11 pages]

WCAT Decisions Considered: Decision No. 638/89I (1989), 12 W.C.A.T.R. 221 apId

DECISION NO. 190/89 (02/12/91) Strachan; Lebert; Jewell

Jurisdiction, Tribunal (costs) (against Board); Damages (against Board); Interest; Jurisdiction, Board (interest); Jurisdiction, Tribunal (interest); Discretion, Board (interest).

The worker died in a motor vehicle accident in 1983. The worker's executrix was advised by the Board that she had the option of receiving compensation or proceeding with a civil action. She elected to proceed with an action, but on an application to the Tribunal, it was determined that the right of action was taken away. The executrix sought reimbursement from the Board of the costs of the civil action and interest on retroactive payment of benefits. The Board refused and the executrix appealed to the Tribunal.

The Tribunal does not have jurisdiction to award costs against the Board. There is no specific provision in the Act regarding the award of costs. The Tribunal's general powers to in s. 81 of the pre-1990 Act do not encompass the power to award costs. The executrix had not commenced an action against the Board for damages. The Panel noted that the Tribunal was not the appropriate forum for seeking damages against the Board and that the appropriate forum would be a civil action against the Board.

The Act does not specifically prohibit the payment of interest nor does it specifically require the payment of interest. Section 39 of the pre-1990 Act requires that compensation be computed and payable. Equity would require that compensation be paid in a timely manner. If payment is not made in a timely manner, it is arguable that the Board has the discretion to establish the fair economic value of the

compensation. The case law in this area is changing and is sufficiently vague at this time for the Panel to conclude that there is no strict prohibition against payment of interest.

The Panel concluded that the Board has a discretion to pay interest, limited by the Board's obligation under s. 89 of the pre-1990 Act to ensure that funds derived from employer assessments are sufficient to compensate workers. In a manner consistent with good public administration, the Board has adopted an interim policy and a final policy on interest. This policy was a reasonable exercise of the Board's limited discretion.

The appeal was dismissed. The executrix was not entitled to costs. She was not entitled to interest prior to the adoption by the Board of its interest policy in 1989. [16 pages]

Ss: 36 [39 pre-1990], 74(a) [81(a) pre-1990], 74(c) [81(c) pre-1990], 101 [89 pre-1990]

WCAT Decisions Considered: Decision No. 123 (1986), 2 W.C.A.T.R. 66 *re*fd to; Decision No. 206A (1988), 9 W.C.A.T.R. 4 *not* folld; Decision No. 227L (1987), 6 W.C.A.T.R. 1 *con*sd

Other Statutes Considered: Canada Labour Code, R.S.C. 1970 c. L-1, s. 96.3(c); Courts of Justice Act, 1984, S.O. 1984 c. 11, s. 141(1)

Cases Considered: Canadian Broadcasting Corp. v. Broadcast Council of CUPE, Local 667 (1987), 38 D.L.R. (4th) 617 (Fed. C.A.) *con*sd; Clark v. Annapolis County Family and Children's Services (1983), 37 R.F.L. (2d) 171 (N.S.C.A.) *con*sd; Ontario (Minister of Transport) v. Phoenix Assurance Co. (1973), 1 O.R. (2d) 113 (C.A.) *con*sd; *Re* Ontario Energy Board (1985), 51 O.R. (2d) 333 (Div. Ct.) *con*sd; *Reference re* National Energy Board Act (1986), 19 Admin L.R. 301 (Fed. C.A.) *con*sd; *Re* Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc. (1985), 51 O.R. (2d) 23 (Div. Ct.) *con*sd; Windsor Roman Catholic Separate School Board v. Windsor (City) (1988), 64 O.R. (2d) 241 (C.A.) *con*sd; Zaidan Group Ltd. v. London (City) (1990), 71 O.R. (2d) 65 (C.A.) *con*sd

DECISION NO. 1032/89 (02/12/91) Marafioti; Robillard; Apsey

Continuing entitlement.

The worker appealed a decision denying him continuing entitlement to benefits after April 1986, with respect to a back strain sustained in November 1985. The medical evidence in 1986 did not support an ongoing back problem due to the lack of organic findings. However, subsequent medical evidence clearly indicated that the worker continued to suffer, after April 1986, from a chronic back condition which could be related to the accident of November 1985.

Chronic pain was not an issue before this Panel and, therefore, the Panel could not rule upon that matter. The appeal was dismissed, but the worker was free to pursue a claim on the basis of chronic pain syndrome if he so chose. [6 pages]

DECISION NO. 23/90R2 (02/12/91) Hartman; Lebert; Apsey

Reconsideration.

The request for the reconsideration of Decision No. 23/90R was refused.

The reconsideration request was based on the failure of the original panel to consider Decision No. 152 of the British Columbia WCB. The Tribunal receives its sole authority from its constituent legislation. A decision of the B.C. WCB is in no way binding in Ontario. The policy expressed by the B.C. decision is only of general interest for agencies applying other legislation and policy. The absence of a reference to Decision No. 152 in the Tribunal's decision was not a significant defect in the Tribunal's administrative process or in the content of its decision. [5 pages]

WCAT Decisions Considered: Decision No. 72R (1986), 18 W.C.A.T.R. 1 refd to; Decision No. 72R2 (1986), 18 W.C.A.T.R. 26 refd to; Decision No. 95R (1989), 11 W.C.A.T.R. 1 refd to; Decision Nos. 23/90 refd to, 23/90R refd to
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-27-01
Cases Considered: Decision No. 152, (1977) 2 W.C.R. 186 (B.C. WCB) refd to

DECISION NO. 542/91 (02/12/91) Bigras; Lebert; Barbeau

Withdrawal (of appeal).

The worker's widow appealed a decision denying her entitlement to benefits resulting from the worker's condition, diagnosed as silicosis and associated lymphatic cancer. The worker was employed as a gold miner for 21 years.

Following the hearing in July 1991, the Panel adjourned the case to obtain additional information. In October 1991, the widow advised the Tribunal that the Board had reviewed the case under its revised Gold Miner Policy (which was adopted in August 1991, but was fully retroactive) and had allowed her claim.

The appeal was considered withdrawn. [4 pages]

DECISION NO. 663/91 (02/12/91) Hartman; Lebert; Apsey

Earnings basis (average weekly earnings); Earnings basis (impractical to calculate); Earnings basis (short or casual employment); Earnings basis (permanent disability).

The worker objected to the Board's calculation of his earnings basis in determining his pension award. The worker was a construction labourer who obtained employment through his union hiring hall. The Board applied its minimum compensation rate to the worker.

The worker's injury occurred in April 1982, two and one-half days after he started working with the accident employer. From March 1981 to September 1981, the worker was unemployed and from September 1981 to March 1982 he was receiving sickness benefits through his union's insurance plan. Since the worker was employed for less than one week in the twelve month period preceding the accident, his rate of remuneration could not be based on an averaging of his weekly earnings for the periods of his employment in the twelve months preceding the accident. Therefore, s. 43(1) of the pre-1985 Act did not apply.

However, the situation was covered by s. 45(2) of the pre-1985 Act. Under s. 45(2) and existing Board policy, it would have been reasonable for the Board to have regard to the earnings of three employees, in the same grade as the worker, who were employed by the accident employer for one year or less prior to the accident. The appeal was allowed. [6 pages]

Ss: 40(2) [45(2) pre-1985], 45(1) pre-1989 [43(1) pre-1985]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-08-07

DECISION NO. 795/91I (02/12/91) Sandomirsky; Robillard; Nipshagen

Referral to Board.

The worker appealed a 1971 decision denying him an increase in his 20% provisional pension. In 1966 the worker had been struck in the head by a falling object. He suffered from dizziness, hearing loss and

tinnitus. He was also chronically depressed and hostile. Early medical reports stated that the worker's hearing loss was psychogenic. Audiometric studies in 1987 showed bilateral hearing loss. A 1988 Board decision concluded that the worker did not suffer from organic hearing loss as a result of the work injury.

It was unclear which disabilities the Board had considered when it granted the worker's 20% provisional pension, but it was clear that no decision had ever been made on psychiatric entitlement. The Panel sent the file back to the Board for a pension re-evaluation with specific consideration to be given to the worker's hearing loss, tinnitus and any psychiatric disability. The Board's assessment was to be returned to the Panel for final consideration of the worker's pension level. [7 pages]

DECISION NO. 365/87R (03/12/91) Onen; Robillard; Barbeau

Reconsideration (error of facts).

The worker requested reconsideration of Decision No. 365/87 in which the hearing panel found that back disability in 1982 was not related to compensable accidents in 1966 and 1968.

The hearing panel may have been mistaken in finding that there were extensive degenerative changes prior to 1966. However, even if the hearing panel was mistaken, the conclusions in the decision were not likely to change since there were only minor degenerative changes in 1982 and it was, therefore, highly unlikely that any changes could be attributed to the compensable accidents.

The application to reconsider was denied. [7 pages]

WCAT Decisions Considered: Decision No. 72R (1986), 18 W.C.A.T.R. 1 refd to; Decision No. 72R2 (1986), 18 W.C.A.T.R. 26 refd to; Decision No. 95R (1989), 11 W.C.A.T.R. 1 refd to; Decision No. 365/87 refd to

DECISION NO. 534/91R (03/12/91) Marafioti; Robillard; Meslin

Access to worker file, P. D.; Reconsideration.

The employer was granted access to the worker's file regarding an appeal to the Tribunal. The documents were relevant to the issue in dispute of initial entitlement. [4 pages]

DECISION NO. 800/91 (03/12/91) Hartman; Jackson; Chapman

Medical examination (employer request).

The worker was required to attend a medical examination by a doctor selected by the employer. There was a valid compensation goal of assessing the worker's ability to return to pre-accident employment. There had been no new medical information in the Board file for nine months prior to the employer's request. [4 pages]

WCAT Decisions Considered: 850/87 refd to

DECISION NO. 819/91 (03/12/91) Sutherland; Robillard; Barbeau

Access to worker file, statutory.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 838/90 (04/12/91) Faubert; Higson; Apsey

Consequences of injury; Alcoholism.

The worker was pushed back against a rockface when he lost control of a drill. The worker appealed a decision of the Hearings Officer denying entitlement for a deterioration in his mental and emotional functioning.

Based on the preponderance of medical evidence, the Panel found that the worker's condition was not related to the accident but, rather, to longstanding alcohol abuse. The appeal was dismissed. [14 pages]

DECISION NO. 481/91I (04/12/91) Faubert; Klym; Jago

Access to worker file, P. D. (issue in dispute) (relevance) (prior claim files).

The worker was appealing a decision denying entitlement for a wrist condition. The employer wanted access to a prior claim file. The file related to a shoulder condition.

The employer would be entitled to relevant documents from prior claim files. In this case, the worker consented to release of a number of documents from the prior file. These documents set out all the information the employer would require regarding a relationship between the prior injury and the current disability. The Panel ordered that these documents be released. [5 pages]

WCAT Decisions Considered: Decision No. 90/91 (1991), 18 W.C.A.T.R. 285 consd; Decision No. 516/90 consd

DECISION NO. 688/91 (04/12/91) Newman; M. Cook; Meslin

Pensions (assessment) (shoulder); Consequences of injury; Intervening causes.

The worker suffered a compensable left shoulder injury in 1972 for which he was awarded a 15% pension. He also suffered a low back injury in 1980. The worker appealed denial of an increase in the pension and denial of entitlement for cervical disability.

The worker complained of severe left shoulder pain with complete loss of movement, postural scoliosis resulting in a six inch difference in height between the shoulders and cervical pain.

There was a conflict in the medical evidence. Some doctors were satisfied that the worker's complaints were genuine and that the scoliosis and the cervical degenerative disc disease were consequences of the compensable disability. There were other doctors who found intentional exaggeration of symptoms. One doctor stated that the worker deliberately exaggerated in order to obtain narcotic drugs.

The Panel found that the worker did suffer from severe disabling shoulder pain and that the 15% pension was not adequate. However, there was intentional exaggeration of the disability. The Panel concluded that

the worker was entitled to a 25% pension for the shoulder disability but that the scoliosis was not compensable since it was the result of deliberate exaggeration and enhancement of symptoms. The intentional aspect of the awkward posture constituted an intervening cause. In addition, the evidence did not establish that the worker suffered a neck injury in the compensable accidents.

The appeal was allowed in part. [21 pages]

DECISION NO. 790/91 (04/12/91) Newman; Crocker; Preston

Credibility.

The worker slipped and fell at work in February 1983. She stopped working in September 1983, claiming a neck disability resulting from the fall. The worker appealed a decision of the Appeals Adjudicator denying entitlement.

Considering numerous contradictions between the worker's evidence and evidence from a variety of other sources, the Panel concluded that the worker's evidence was not reliable. The Panel concluded that the worker did not strike her head or neck when she fell. The worker was now suffering from emotional difficulty but the evidence did not support a relationship to the fall in February 1983. The appeal was dismissed. [7 pages]

DECISION NO. 862/91I (04/12/91) McIntosh Janis; Robillard; Barbeau

Adjournment (additional medical evidence).

The worker suffered a compensable injury in 1972 for which he was receiving a 70% pension. The worker appealed denial of temporary benefits in 1988 and denial of a partial commutation of his pension for the purpose of purchasing a delivery truck.

The Panel decided that it would also consider the issue of entitlement to a pension supplement.

The worker requested an assessment to determine his vocational rehabilitation potential. The Panel agreed that such an assessment was necessary in order to determine the issues in this case. The hearing was adjourned. [5 pages]

WCAT Decisions Considered: 568/90 *reld* to

DECISION NO. 870/91I (04/12/91) McCombie; Crocker; Preston

Adjournment (addition of representative).

The worker suffered injuries in compensable accidents in 1980 and 1982. The worker appealed denial of entitlement for a bilateral elbow condition.

In this case, there had been two claims and a number of appeals by the worker, who was unrepresented. The Hearings Officer had only found that the worker's elbow condition was not related to the 1980 accident. In the circumstances, the hearing was adjourned to allow the worker to obtain a representative. [4 pages]

DECISION NO. 598/90 (06/12/91) Hartman; Robillard; Nipshagen

Delay (onset of symptoms); Continuing entitlement; Benefit of the doubt.

The worker suffered a back injury in 1973, for which he did not lose any time immediately. He also suffered an injury in 1983. The issues on the appeal were disability subsequent to the accidents.

Applying the benefit of doubt in favour of the worker, the Panel found that the worker aggravated preexisting spondylolisthesis in the accident in 1973, resulting in surgery in 1974. The disability in 1983 resulted from the unsuccessful fusion surgery in 1974. The worker was entitled to benefits subsequent to the surgery in 1984 for aggravation of a preexisting asymptomatic condition and to benefits following the 1983 accident. [8 pages]

WCAT Decisions Considered: 598/90L refd to

DECISION NO. 652/91L (06/12/91) Marafioti; Higson; Nipshagen

Leave to appeal (substantial new evidence) (medical report).

The worker applied for leave to appeal a decision of the Appeal Board granting a three year pension for psychiatric disability. New medical reports submitted by the worker did not constitute substantial new evidence. Leave to appeal was denied. [4 pages]

DECISION NO. 689/91I (06/12/91) McIntosh-Janis; Shartal; Preston

Supplements, transitional provisions (benefit from rehabilitation); Suitable employment; Referral to Board.

The worker suffered a compensable injury in 1986 for which she was awarded a 10% provisional pension for functional disability. In 1987, she attempted to return to work which the Board considered suitable. However, she stopped working because of pain. The worker appealed a decision of the Hearings Officer denying a supplement under s. 135(4) of the pre-1990 Act.

The Panel found that the work in 1987 was not suitable. The Board only considered whether the job was suitable for the worker's physical impairment. However, it was not suitable considering her compensable psychiatric condition.

The Board's assessment of suitability led it to conclude that the worker was not entitled to benefits under s. 135(4). No regard was had to vocational rehabilitation and entitlement under s. 135(2).

The Panel referred the matter back to the Board to review the worker's vocational rehabilitation potential under s. 135(2) and to report back to the Tribunal. The Panel would then determine entitlement under either s. 135(2) or (4). [7 pages]

Ss: 147 [135 pre-1990]

DECISION NO. 856/91 (06/12/91) McCombie; Lebert; Preston

Accident (occurrence); Three week rule (witnesses).

The worker appealed a decision of the Hearings Officer denying entitlement for an accident which the worker claimed occurred at work in December 1984.

In a preliminary matter, the Panel decided to hear a witness even though the Panel was not informed of the employer's intention to call this witness until less than one week before the hearing. The witness was the only eye witness to the accident and his evidence was highly relevant.

The evidence of the worker and the witness was diametrically opposed on several crucial points. The Panel preferred the evidence of the worker which it found to be more consistent than that of the witness. The Panel found that an accident occurred as described by the worker. The appeal was allowed. [7 pages]

DECISION NO. 875/91 (06/12/91) McCombie; Jackson; Barbeau

Pensions (lump sum) (ten per cent pension).

The worker appealed a decision of the Hearings Officer denying payment of the worker's pension as a lump sum under s. 43(4) of the pre-1985 Act. The worker was awarded a 15% pension and had received a partial commutation, so that the remaining pension was less than 10%. The Panel found that the request could not be considered under s. 43(4) since the pension was greater than 10%. The appeal was dismissed. [6 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 refd to; Decision No. 505/91 refd to

**DECISION NO. 892/91 (06/12/91) McIntosh-Janis; Drennan; Howes
Brunino v. Principe**

Procedure (absent parties).

The hearing of an application to determine the right to sue was adjourned due to the absence of an interested party because of illness. The interested party was not directly involved in the civil action but was involved since the plaintiff was apparently a worker of the party. [6 pages]

DECISION NO. 236/91 (10/12/91) Kenny; Beattie; Nipshagen

Continuing entitlement; Aggravation (preexisting condition) (disc, degeneration) (lumbar).

The worker suffered a compensable accident in February 1985 when she bent over to pull out a container, then felt a sudden sharp pain in her back and down her leg. She returned to work in March 1985. The worker stopped working in February 1988 due to back problems and had not returned to work since.

The worker's problems may have resulted primarily from degenerative disc disease and that condition may have been present before the 1985 accident. However, before that accident, the worker did not experience any back problems. The accident rendered the worker's back condition symptomatic. The worker's back problems persisted after the accident and got progressively worse until she had to lay off work in 1988.

The worker's congenital tendency to premature spinal degeneration may have ultimately given her problems with daily living activities, even in the absence of the work accident. However, the evidence did not establish that the progression of the underlying degenerative condition would have reached the current level of disability in the absence of the 1985 accident. The Panel accepted that the worker's underlying condition became symptomatic more rapidly than it would have in the absence of the 1985 work accident.

The 1985 accident was a significant cause of the worker's back disability since 1988. The worker was entitled to further benefits. [11 pages]

DECISION NO. 651/91 (10/12/91) Marafioti; Higson; Nipshagen

Access to worker file, statutory.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 808/91 (10/12/91) Faubert; Jackson; Shuel

Recurrences (compensable injury).

The worker suffered a back injury in 1975 for which he was awarded a 15% pension. He suffered a further back injury at work in 1989 while changing a light bulb. The employer appealed a decision of the Hearings Officer finding that the 1989 injury was a new accident rather than a recurrence.

Board policy provides for recognizing a recurrence when there is medical compatibility and continuity and an absence of a new accident. In this case, the worker had an underlying congenital abnormality which rendered his back vulnerable to injury. He experienced continuing low back symptoms following the 1975 accident with occasional periods of temporary disability. However, not every acute period of disability must be attributed to the abnormality or the original accident. In this case, there was a clearly described twisting motion which produced acute symptoms which were somewhat different from symptoms previously reported.

The Panel was satisfied that the disability in 1989 resulted from a new accident. The appeal was dismissed. [9 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 02-04-02

DECISION NO. 876/91 (10/12/91) McIntosh-Janis; Shartal; Nipshagen

Adjournment (representative availability).

The worker was appealing denial of a commutation of his pension. The hearing was adjourned and the matter was referred to the Board to undertake medical and vocational assessments which had been outlined in Board memos but not performed. [3 pages]

DECISION NO. 939/90 (13/12/91) Pfeiffer; B. Cook; Jago*Continuing entitlement.*

The worker suffered a compensable injury to his knee in February 1982 but did not stop working until June 1982. He worked intermittently after that time. For certain of the periods during which he did not work, the worker received benefits. He was now appealing the denial of temporary benefits for two of the periods during which he did not work.

The worker was not entitled to further temporary benefits as he was not temporarily disabled during the periods in question. The worker's knee was not the reason that he stopped work on either occasion. It did not appear that the worker's knee was any better at the times when he returned to work than it was during the periods for which he was claiming benefits. The worker did not seek medical attention during those periods. His decisions to stop work seemed to have been based on personal problems or disputes with the employer. The knee was not a significant factor in the worker's decision to stop work on the two occasions in question. [6 pages]

DECISION NO. 556/91 (13/12/91) McCombie; Robillard; Jago*Access to worker file, statutory; Jurisdiction, Tribunal (access to worker file) (documents not considered by Board).*

The worker appealed a decision of the Access Specialist to release documents to the employer. The issue in dispute was the amount of a pension granted in March 1991. However, there were no reports subsequent to July 1990 in the material sent to the Tribunal. It appeared that these subsequent documents had not gone to the worker either. The Panel obtained the subsequent documents and treated this information in the same manner as an objection to release of information at the Tribunal.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 585/91 (13/12/91) McCombie; M. Cook; Meslin*Chondromalacia (knee).*

The worker was involved in a compensable automobile accident in March 1984. At that time he complained of dizziness and of pain in his chest and neck. X-rays were taken of his neck, chest, right hand and left knee. In 1979, the worker was involved in a non-compensable automobile accident. His injuries in that accident included fractured teeth and lacerations to the right knee.

The worker received temporary total benefits until July 1984. For the period since July 1984, he was awarded 50% temporary benefits on the basis of blackouts and psychotraumatic disability. The worker sought additional benefits for his left knee, right knee, low back and dental problems.

The medical evidence supported a causal relationship between the 1984 accident and the worker's left knee condition, diagnosed as chondromalacia patellae. That condition can take up to a year to develop to the stage where symptoms become severe and it can be caused by a blow to the front of the knee.

There was no causal relationship between the 1984 accident and the right knee condition. It was the right knee that was involved in the 1979 accident. There was no significant low back disability. What disability there was, was not related to the 1984 accident. The worker's dental problems were not related to the 1984 accident. They seemed to be related to chronic oral hygiene neglect, possibly in combination with severe trauma in 1979.

The worker was entitled to additional benefits only for his left knee condition. [10 pages]

DECISION NO. 803/91 (13/12/91) Faubert; M. Cook; Barbeau
Canadian National Railway Co. v. Miller

Right to sue; Subrogation; Schedule 2 employer.

A worker of a Schedule 2 employer was injured in an accident. The accident was reported and he received benefits. He also commenced an action against his employer and against a number of other parties.

The worker's right of action against his employer was taken away and the employer was entitled to a declaration that it was not liable for damages, contribution or indemnity for damage caused to the worker.

The employer, as a Schedule 2 employer, had a subrogated right of action against the other defendants since the worker had accepted workers' compensation benefits. It was up to the employer to decide whether to maintain the action against the other defendants. [10 pages]

Ss: 10(4) [8(4) pre-1990]

WCAT Decisions Considered: Decision No. 1001/87 (1988), 8 W.C.A.T.R. 239 consd; Decision No. 1123/87 (1988), 8 W.C.A.T.R. 274 consd

Cases Considered: MacIntosh v. Gzowski (1979), 27 O.R. (2d) 151 (C.A.) consd; Toronto Railway Co. v. Hutton (1919), 50 D.L.R. 785 (S.C.C.) consd

DECISION NO. 830/91 (13/12/91) Newman; Fuhrman-Thompson; Shuel

Rehabilitation (cooperation).

The worker appealed a decision of the Hearings Officer granting only 75% benefits for temporary partial disability. On the evidence, the worker was temporarily partially disabled during the period in question. There was no indication that the worker failed to cooperate with rehabilitation or was otherwise disqualified from receiving full benefits. The appeal was allowed. [4 pages]

DECISION NO. 628/91 (17/12/91) Sandomirsky; Shartal; Jago

Earnings basis (temporary disability); Board Directives and Guidelines (earnings basis) (temporary disability).

The worker suffered a compensable injury in October 1982. The worker was laid-off for two of the four weeks preceding the accident and for 18 weeks in the year preceding the accident. The worker appealed a decision of the Hearings Officer calculating temporary benefits on the basis of his earnings during the year prior to the accident, including the weeks that the plant was shut down.

In this case, the Board followed its policy by calculating benefits for the four weeks prior to the accident and for the 12 months prior to the accident, and used the higher of the two calculations. It also followed its policy of including in the calculation the time lost from work due to plant shut downs.

In 1985, the Board adopted a new policy for establishing average earnings for permanent disability for accidents between 1981 and 1983 to use the worker's hourly rate at the time of the accident. This was in recognition of the economic conditions at the time which distorted workers' earnings.

It was established on the evidence that the worker lost considerable time from work due to plant shut downs between 1981 and 1983. However, this did not reflect his usual work pattern. He had been regularly and continuously employed before and after the accident.

The Panel found no basis for distinguishing between temporary and permanent benefits for accidents occurring during the recession between 1981 and 1983. The worker's benefits should be calculated on the basis of his earnings at the time of the accident. The appeal was allowed. [8 pages]

Ss: 40(1) [45(1) pre-1985, 45(6) pre-1985]

WCAT Decisions Considered: Decision No. 712/87 (1989), 12 W.C.A.T.R. 7 refd to; Decision No. 948/88 (1990), 16 W.C.A.T.R. 32 refd to; Decision No. 994/88 (1989), 12 W.C.A.T.R. 61 refd to; Decision No. 362/90 (1990), 15 W.C.A.T.R. 195 refd to; Decisions No. 206/88 refd to, 187/89 refd to, 752/90 refd to

Board Directives and Guidelines: Claims Services Division Manual: s. 45(1), p. 141, Directive 2 (since amended); s. 132 re s. 43(1) Former Act, p. 275A, Directive 2

DECISION NO. 629/91 (17/12/91) Sandomirsky; Shartal; Jago

Earnings basis (temporary disability); Board Directives and Guidelines (earnings basis) (temporary disability).

The worker suffered a compensable injury in September 1983. The worker was laid-off for two of the four weeks preceding the accident and for 29 weeks in the year preceding the accident. The worker appealed a decision of the Hearings Officer calculating temporary benefits on the basis of her earnings during the four weeks prior to the accident.

In this case, the Board followed its policy by calculating benefits for the four weeks prior to the accident and for the 12 months prior to the accident, and used the higher of the two calculations. It also followed its policy of including in the calculation the time lost from work due to plant shut downs.

In 1985, the Board adopted a new policy for establishing average earnings for permanent disability for accidents between 1981 and 1983 to use the worker's hourly rate at the time of the accident. This was in recognition of the economic conditions at the time which distorted workers' earnings.

It was established on the evidence that the worker lost considerable time from work due to plant shut downs between 1981 and 1983. However, this did not reflect her usual work pattern. She had been regularly and continuously employed before and after the accident.

The Panel found no basis for distinguishing between temporary and permanent benefits for accidents occurring during the recession between 1981 and 1983. The worker's benefits should be calculated on the basis of her earnings at the time of the accident. The appeal was allowed. [8 pages]

Ss: 40(1) [45(1) pre-1985, 45(6) pre-1985]

WCAT Decisions Considered: Decision No. 712/87 (1989), 12 W.C.A.T.R. 7 refd to; Decision No. 948/88 (1990), 16 W.C.A.T.R. 32 refd to; Decision No. 994/88 (1989), 12 W.C.A.T.R. 61 refd to; Decision No. 362/90 (1990), 15 W.C.A.T.R. 195 refd to; Decisions No. 206/88 refd to, 187/89 refd to, 752/90 refd to

Board Directives and Guidelines: Claims Services Division Manual: s. 45(1), p. 141, Directive 2 (since amended); s. 132 re s. 43(1) Former Act, p. 275A, Directive 2

DECISION NO. 630/91 (17/12/91) Sandomirsky; Shartal; Jago

Earnings basis (temporary disability); Board Directives and Guidelines (earnings basis) (temporary disability).

The worker suffered a compensable injury in June 1983. The worker was laid-off for two of the four weeks preceding the accident and for 24 weeks in the year preceding the accident. The worker appealed a decision of the Hearings Officer calculating temporary benefits on the basis of his earnings during the year

prior to the accident, including the 24 weeks that the plant was shut down.

In this case, the Board followed its policy by calculating earnings for the four weeks prior to the accident and for the 12 months prior to the accident, and used the higher of the two calculations. It also followed its policy of including in the calculation the time lost from work due to plant shut downs.

In 1985, the Board adopted a new policy for establishing average earnings for permanent disability for accidents between 1981 and 1983 to use the worker's hourly rate at the time of the accident. This was in recognition of the economic conditions at the time which distorted workers' earnings.

It was established on the evidence that the worker lost considerable time from work due to plant shut downs between 1981 and 1983. However, this did not reflect his usual work pattern. He had been regularly and continuously employed before and after the accident.

The Panel found no basis for distinguishing between temporary and permanent benefits for accidents occurring during the recession between 1981 and 1983. The worker's benefits should be calculated on the basis of his earnings at the time of the accident. The appeal was allowed. [8 pages]

Ss: 40(1) [45(1) pre-1985, 45(6) pre-1985]

WCAT Decisions Considered: Decision No. 712/87 (1989), 12 W.C.A.T.R. 7 refd to; Decision No. 948/88 (1990), 16 W.C.A.T.R. 32 refd to; Decision No. 994/88 (1989), 12 W.C.A.T.R. 61 refd to; Decision No. 362/90 (1990), 15 W.C.A.T.R. 195 refd to; Decisions No. 206/88 refd to, 187/89 refd to, 752/90 refd to

Board Directives and Guidelines: Claims Services Division Manual: s. 45(1), p. 141, Directive 2 (since amended); s. 132 re s. 43(1) Former Act, p. 275A, Directive 2

DECISION NO. 632/91 (18/12/91) Signoroni; Rao; Nipshagen

Disablement (nature of work).

The worker was entitled to benefits for a ten day period during which she was unable to work due to upper chest wall symptoms. She was a power sewing machine operator and the symptoms appeared at a time when production demands required her to produce an average of 100 units daily, rather than the usual 30. The job involved above-shoulder work. The worker returned to modified sewing work and experienced no further disabling symptoms. Despite the lack of a clear diagnosis and some evidentiary gaps, the Panel was satisfied that the worker's symptoms were work-related. [5 pages]

DECISION NO. 750/91 (18/12/91) Moore; Robillard; Shuel

Pensions (assessment) (back); Pensions (assessment) (whole person concept).

The worker suffered a compensable back injury for which he was receiving a 60% pension. The worker appealed a decision of the Hearings Officer denying an increase in the pension.

The 60% pension was the equivalent of the Rating Schedule amount for a fully immobile spine. Applying the whole person concept, the worker's pension accurately reflected the extent of his permanent disability. The appeal was dismissed. [8 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 apld; Decision No. 901/87(2) apld

DECISION NO. 473/91I (19/12/91) Moore; Lebert; Barbeau

Cancer (liver).

The worker's widow appealed a decision of the Hearings Officer denying dependency. On the evidence, particularly the evidence of a post-hearing medical report ordered by the Tribunal from a pathologist, the Panel found that the worker's cancer was primary cancer of the liver. The hearing would reconvene to determine whether the cancer resulted from workplace exposure. [7 pages]

DECISION NO. 782/91I (19/12/91) McGrath; Higson; Chapman

Adjournment (referral to Board).

The hearing was adjourned and the matter referred to the Board to assess the worker and report back to the Tribunal concerning chronic pain and psychotraumatic disability. [4 pages]

DECISION NO. 820/91 (19/12/91) Newman; Crocker; Meslin

Pensions (assessment) (chronic pain); Board Directives and Guidelines (chronic pain) (marked life disruption); Pensions (stacking).

In 1984, the worker was awarded a 5% pension that recognized a permanent organic disability in his shoulder. In 1991, he was granted a 10% pension for chronic pain. In accordance with its policy of not stacking benefits, the Board subtracted the 5% organic disability award from the 10% award granted in respect of the chronic pain disability. The worker was thus receiving a 5% pension in accordance with the chronic pain disability policy. The worker sought an increase in the amount of the pension granted under the chronic pain disability policy.

The worker suffered significant lifestyle changes after he stopped working in 1982. These changes were primarily due to his significantly diminished financial resources. When assessing a pension for chronic pain disability, it is important to separate lifestyle changes caused by the disability from lifestyle changes caused by the worker's reduced financial status. Where the disability produces an emotional state which causes family breakdown or social withdrawal, these factors are relevant under the Board policy pertaining to recognition of emotional disorders. However, the intent of the policy is not to compensate workers for the financial consequences of disability, or diminished earnings. Frustration and stress caused by this worker's reduced income were not compensable under the chronic pain disability policy.

The evidence showed that the worker suffered from an emotional disability caused by his shoulder pain. This was an element separate and distinct from the problem of financial hardship resulting from the disability. A social work evaluation showed that the worker had become reliant on family members for activities which took place outside the home, he demonstrated a moderate anxiety state and he nurtured strong passive dependency tendencies. This placed the worker at the bottom of Category 2, "moderate impairment of the total person", under the Board's chronic pain disability policy. He was entitled to an increase in his chronic pain pension to 15%.

The Board's policy against stacking is designed to prevent double compensation for a single disability. If the same disability is being referred to by two different names, stacking is inappropriate. However, if one injury results in two distinct disabilities, the granting of two different awards may be appropriate.

In this case, a minor disability of organic origin remained operative. The chronic pain pension award was made in recognition of a separate and distinct component of the worker's disability. Payment of both the 5% organic award and the 15% chronic pain award was appropriate. [10 pages]

WCAT Decisions Considered: Decision No. 409/91 refd to Board Directives and Guidelines: Operational Policy Manual, Document no. 03-03-03

DECISION NO. 850/91 (19/12/91) Robeson; Robillard; Nipshagen

Access to worker file, statutory.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 851/91 (19/12/91) Robeson; Robillard; Nipshagen

Access to worker file, statutory.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 205/89 (20/12/91) Sandomirsky; Ferrari; Meslin

Pensions (assessment) (back); Supplements, temporary (partial award); Health care (linen allowance).

The worker suffered a back injury in 1975 for which he was awarded a 15% pension. The worker appealed denial of an increase in the pension, reduction of a temporary supplement to 35%, denial of temporary total benefits for a number of days in 1986 and denial of an increase in a linen allowance.

A review of the medical reports and the worker's evidence showed that the pattern of pain and disability has been the same since the accident. The Panel was satisfied that the 15% pension adequately reflected the level of disability.

The Board granted full supplementary benefits for one year, then reduced supplementary benefits to 35%. Although unsuccessful in obtaining employment, the worker was cooperating with rehabilitation and conducting a job search. There were no Board guidelines for granting less than a full supplement. The Panel found that the worker was entitled to the full supplement for the period in question.

The worker received temporary benefits for a recurrence in 1986. However, the Board denied temporary benefits for four days before and three days after the period accepted by the Board. These periods of time off work were authorized by the worker's doctor. The worker called his doctor on January 5 and got an appointment for January 9. It appeared arbitrary to grant benefits from the day the worker saw his doctor. The worker was entitled to temporary benefits for the days in question.

The Board granted a linen allowance of \$50 per year to reimburse the worker for laundering bedding and towels he used in a home physiotherapy programme. The worker wanted \$25 per month to cover the cost of taking the laundry out to be cleaned. The worker could have washed the linen at home and saved the expense of the laundry. There was no basis to question the Board's decision to grant the \$50 allowance.

The appeal was allowed in part. [11 pages]

WCAT Decisions Considered: Decision No. 205/89L (1990), 15 W.C.A.T.R. 66 consd

DECISION NO. 605/91 (20/12/91) Ellis; Lebert; Nipshagen

Re-employment (termination); Re-employment (determination re return to work); Standard of proof; Presumptions (burden of proof); Presumptions (termination of re-employment) (standard of proof); Re-employment (notice from Board) (effective date); Statutory interpretation (principles of) (large and liberal interpretation); Statutory interpretation (principles of) (broad and purposive interpretation); Evidence (admissibility) (arbitration award).

The employer appealed a decision of the Reinstatement Officer finding that it had failed to fulfil its obligations under s. 54b of the pre-1990 Act.

In a preliminary matter, the Panel admitted a grievance arbitration award relating to the issues on the appeal. The award was relevant. The weight that should be given to it would be decided by the Panel. In a further preliminary matter, the Panel decided to postpone consideration of the issue of penalty until after the decision is made on whether the employer failed to fulfil its obligations. This would eliminate the need for the employer to make submissions in the alternative and would also give an opportunity for the employer to offer to re-employ should it be found to have breached its obligations.

The worker suffered a compensable injury in April 1990. On July 10, 1990, the Board advised the employer that the worker was able to perform suitable work as of June 13, 1990. This notice led to meetings with the employer in August and September and the offer of work in accordance with a rehabilitation plan as of September 17. The worker's employment was terminated on October 31 for failure to take a drug test. The Board sent a letter dated December 19 that the worker was fit to perform her pre-accident job as of October 29.

The Panel considered the issue of the time at which the employer's obligation to offer work arises. The Board submitted that there is a general obligation to re-employ in s. 54b(1) and that the obligation is not dependent on receiving notice from the Board. It relied on two principles of interpretation: 1) that the Act was remedial and should be given a large and liberal interpretation; 2) that the statute should be given a board and purposive interpretation. The Panel found that the broad and purposive rule of interpretation was limited to quasi-constitutional legislation such as human rights codes. The Workers' Compensation Act did not fall into such a category. The large and liberal interpretation is limited by the requirement to read words in their grammatical and ordinary sense. The Panel found the Board's interpretation incompatible with the plain reading of the section. The Panel concluded that the employer's obligation to offer work under s. 54b arose only after receiving a notice from the Board.

Since the obligation to re-employ is only effective on receipt, the "as of" dates in the Board's notices were not effective. Therefore, the second notice sent by the Board had no effect on the employer's obligations at the end of October. At that time, there was a notice of fitness for suitable work dated July 10. That was a valid notice that was still in effect. Although there was no formal record of the Board having made a determination within s. 54b(2), the determination could be inferred from the fact that the notice was issued and from the available medical evidence.

Section 54b(10) provides that an employer who terminates the employment of a re-employed worker within six months is presumed not to have fulfilled its obligations unless the contrary is shown. On the question of what must be "shown" to rebut the presumption, the Panel found that it was not necessary to show just cause but, rather, only that there were real reasons for termination that were not related to the worker's disability or rights under s. 54b.

In considering the issue of the standard of proof required to rebut the presumption, the Panel first considered whether the presumption affects the burden of proof (in effect, who is to bear the consequences when a fact cannot be proven) or simply the burden of going forward with evidence. In the non-adversarial workers' compensation system, neither party has the burden of putting forward evidence to prove any fact. Accordingly, the Legislature could not have intended that the presumption merely shift the burden of going forward with evidence.

A review of the law relating to presumptions led the Panel to conclude that the intended or designed effect of a presumption is a characteristic unique to each particular presumption. The standard of proof in civil cases is infinitely variable, short of the upper limit provided by the criminal law standard of beyond a reasonable doubt. The degree of probability in respect of any particular issue must be determined by an adjudicator at a level that is commensurate with the occasion. If the context or special circumstances convince a panel that the normal level of satisfaction is not a reasonable basis for a decision, then the panel is required to adopt a level of satisfaction that it thinks is reasonably necessary.

The standard of proof is a separate matter from the effect of a presumption. The presumption does not of itself affect or change the standard of proof. It merely identifies a question that is likely to raise an issue as to the level of satisfaction that the adjudicator should reasonably require.

There was reason for requiring a higher standard of proof to rebut the presumption in s. 54b(10) since the issue involves predominantly a question of the employer's intent, a question that is inherently not within the worker's or the Board's knowledge. In the circumstances, the Panel would require a substantial doubt in order to rebut the presumption.

In this case, the employer's drug policy provided for discipline up to and including termination for failure to comply with a drug test. However, no other disciplinary action was considered. Considering this and other evidence of the circumstances, the Panel was not convinced at a level of satisfaction reasonable to the occasion that the termination was not influenced by the worker's injury or matters related to s. 54b. Accordingly, the employer had not fulfilled its obligations under s. 54b.

The appeal was dismissed. The hearing would reconvene on the issue of penalty. [108 pages]

Ss: 54(1) [54b(1) pre-1990], 54(2) [54b(2) pre-1990], 54(3) [54b(3) pre-1990], 54(4) [54b(4) pre-1990], 54(5) [54b(5) pre-1990], 54(10) [54b(10), pre-1990]

WCAT Decisions Considered: Decision No. 51 (1987), 4 W.C.A.T.R. 67 consd; Decision No. 182 (1988), 10 W.C.A.T.R. 1 consd; Decision No. 363 (1987), 6 W.C.A.T.R. 42 refd to; Decision No. 516 (1987), 4 W.C.A.T.R. 210 consd; Decision No. 915 (1987), 7 W.C.A.T.R. 1 refd to; Decision No. 918 (1988), 9 W.C.A.T.R. 48 consd; Decision No. 183/87 (1987), 5 W.C.A.T.R. 134 refd to; Decision No. 712/87 (1989), 12 W.C.A.T.R. 7 refd to; Decision No. 42/89 (1989), 12 W.C.A.T.R. 85 refd to; Decision No. 1013/89 (1990), 17 W.C.A.T.R. 86 refd to; Decisions No. 944/87LR consd, 244/90 refd to, 968/90 refd to, 372/91 consd

Board Directives and Guidelines: Operational Policy Manual, Document no. 07-05-05

Other Statutes Considered: Human Rights Code, 1981, S.O. 1981 c. 53; Interpretation Act, R.S.O. 1980 c. 219, s. 10

Cases Considered: Action Travail des Femmes v. Canadian National Railway Co. (1987), 40 D.L.R. (4th) 193 (S.C.C.) refd to; Re Bhinder and Canadian National Railway Co. (1985), 23 D.L.R. (4th) 481 (S.C.C.) consd; Decision no. R. B. 19 (March 28, 1991) (WCB Re-employment Branch) consd; La France v. Commercial Photo Service Inc., [1980] 1 S.C.R. 536 refd to; Re Ontario Human Rights Commission and Simpson-Sears Ltd. (1985), 23 D.L.R. (4th) 321 (S.C.C.) consd

Appendices: Tribunal staff memorandum on Presumptions - Standard of Rebuttal

DECISION NO. 852/91 (20/12/91) Robeson; Robillard; Nipshagen

Access to worker file, statutory.

Access to the worker's file was granted to the employer, except for a number of references which were not relevant. [4 pages]

DECISION NO. 853/91 (20/12/91) Robeson; Robillard; Nipshagen

Access to worker file, statutory.

Access to the worker's file was granted to the employer, except for a number of references which were not relevant. [4 pages]

DECISION NO. 859/91I (20/12/91) McCombie; Lebert; Preston

Supplements, transitional provisions (benefit from rehabilitation); Suitable employment; Referral to Board.

The worker was receiving a 20% pension for his low back condition. He left his job which involved extensive driving to locations as far away as the Maritime Provinces. The Panel found that the extensive driving involved in the worker's job rendered it unsuitable for someone with a 20% back disability and that the worker was cooperating as best he could with his own rehabilitation. However, the Panel found that he was not disabled beyond the 20% level.

If the provisions of s. 43(5) of the pre-1985 Act were still applicable to this situation, the Panel would have proceeded to determine whether the worker was entitled to a temporary supplement. However, since the period in question came after July 26, 1989, the worker was subject to ss. 135(2) and 135(4) of the pre-1990 Act.

The Panel referred the matter back to the Board for a review of the worker's entitlement to supplementary benefits under ss. 135(2) and 135(4). [8 pages]

Ss: 147 [135 pre-1990]

WCAT Decisions Considered: Decision No. 689/91I apld

DECISION NO. 742/90I2 (23/12/91) Signoroni; Drennan; Preston

Bias.

During the course of the hearing, one of the Panel members questioned the worker on several aspects of his testimony. The line of questioning raised the issue as to whether the questions were based on the member's direct knowledge of relevant matters that was not included in the material placed before the Panel. The worker submitted that the questioning raised a reasonable apprehension of bias that could only be cured by having a fresh hearing before a new panel.

The Panel was not of the view that these circumstances clearly raised a reasonable apprehension of bias, according to the jurisprudence. Furthermore, any potential apprehension of bias could be rectified by permitting the worker to adduce evidence and make submissions relevant to the matters relied upon by the member in his questioning. However, putting the matter before a new panel would ensure that the time and resources of the parties and the Tribunal would be directed to adjudicating the real merits of the claim rather than a controversial procedural point.

This case was directed to be scheduled immediately for a new hearing, before a differently constituted panel. [4 pages]

DECISION NO. 519/91 (23/12/91) Bigras; Felice; Preston

Administrative Fund (transfer of costs); Negligence (worker).

The employer appealed a decision of the Hearings Officer denying a transfer of costs of a fatal accident to the Administrative Fund. The employer was a cement form installation contractor. The worker was a form setter. The worker was killed when a section of forms broke loose from a foundation and fell on him. After the accident, it was learned that the worker was an illegal immigrant who had purchased another person's social insurance card and union card. The employer submitted that the worker was not really qualified as a form setter and that the worker's negligence and inexperience caused the accident.

A worker's negligence does not remove an employer's financial responsibility for an accident. Negligence is only considered when there are different employers involved under s. 8(9) and (11). There was no convincing evidence that the deception of the worker and his inexperience caused the accident. The worker had been doing the job for a year. It was clear that someone was negligent in removing bindings which held the forms to the wall but there was no evidence that it was the worker.

The appeal was dismissed. [7 pages]

DECISION NO. 711/91 (23/12/91) Faubert; Klym; Nipshagen
Canada Dry Bottling Co. Ltd. v. Grubisic

Right to sue; Executive officers; Transportation industry (owner/operator); Worker.

The respondent in a section 15 application was the owner/operator of a truck. He had incorporated a numbered company for the purposes of carrying on his business. He was the sole executive officer of this company. All payments from brokerage firms that hired him as an owner/operator were made to the numbered company. The respondent's transport licence was in the company's name, but he retained ownership of his truck personally.

The applicant argued that the numbered company was carrying on a trucking business under Schedule 1 and that the respondent, as a worker of that company, lost his right to sue.

Although the respondent also performed the duties of a worker, he remained a legitimate executive officer of the company. In the absence of an election under s. 11, to be deemed a worker with personal coverage, an executive officer is not a worker and retains the right to sue. The application was dismissed. [8 pages]

Ss: 1(1) "worker" [1(1)(z) pre-1990]

WCAT Decisions Considered: Decision No. 226/89 (1989), 11 W.C.A.T.R. 307 apld; Decision No. 170/90 (1990), 14 W.C.A.T.R. 282 apld

DECISION NO. 196/89R (24/12/91) Signoroni; Crocker; Chapman

Reconsideration (new evidence); Reconsideration (consideration of evidence).

The worker's request to reconsider Decision No. 196/89 was denied. New medical reports did not add anything significant to previous reports from the same doctors already on file. Further, the hearing panel did not ignore significant medical evidence. It was not necessary for the hearing panel to comment on each medical report filed. [6 pages]

WCAT Decisions Considered: Decision No. 72R (1986), 18 W.C.A.T.R. 1 refd to; Decision No. 72R2 (1986), 18 W.C.A.T.R. 26 refd to; Decision No. 95R (1989), 11 W.C.A.T.R. 1 refd to; Decision No. 196/89 refd to

DECISION NO. 557/90L (24/12/91) Kenny; Robillard; Apsey

Jurisdiction, Tribunal (final decision of Board) (reconsideration of Appeal Board decision); Leave to appeal (good reason to doubt correctness) (consideration of issue).

The worker applied for leave to appeal a decision of the Appeal Board denying entitlement to temporary benefits. The Appeal Board found that the worker was not totally disabled and was not available for employment.

There was an issue as to whether leave was required since the worker had requested a reconsideration of the Appeal Board decision and a Claims Adjudicator had considered the request. The Panel found that leave was required since the Claims Adjudicator had given a preliminary opinion only and the Hearings Branch had decided that it did not have power to reconsider the Appeal Board decision.

There was good reason to doubt the correctness of the Appeal Board decision that the worker was entitled to no benefits. The Board found the worker to be partially disabled but did not appear to consider whether modified work was available and, if the worker was disqualified from receiving full benefits, did not appear to consider the level of benefits to which the worker was entitled.

Leave to appeal was granted. [6 pages]

WCAT Decisions Considered: 669/87L refd to, 92/90 refd to

DECISION NO. 628/90 (24/12/91) Signoroni; Beattie; Preston

Delay (onset of symptoms); Benefit of the doubt.

The employer appealed a decision of the Hearings Officer granting entitlement for a low back disability. In 1987, the worker was diagnosed as suffering from L4-5 disc prolapse on the right side. The worker related this condition to an incident at work in 1978.

Considering the medical evidence, the Panel found that the worker likely suffered a disc injury at L5-S1 in the 1978 accident. It was unlikely that the L4-5 disc prolapse was related to the 1978 accident. However, it could not be determined which disc level was involved with the worker's current symptoms. Applying the benefit of doubt in favour of the worker, the worker was entitled to benefits.

The appeal was dismissed. [8 pages]

DECISION NO. 355/91 (24/12/91) Signoroni; Ferrari; Jago

In the course of employment (break); In the course of employment (employer's premises); In the course of employment (personal activity).

The employer appealed a decision of the Hearings Officer granting entitlement. During a coffee break, the worker went from her office on the 19th floor of a building to ground level to get coffee. She decided

to go out to get a newspaper. On her way back into the building, she tripped on an elevated concrete stretch that went from the building to the sidewalk.

The Panel found that the elevated concrete stretch was part of the employer's premises. Coffee break was an accepted practice by the employer. The Panel concluded that the worker was within the sphere of her employment. The appeal was dismissed. [7 pages]

WCAT Decisions Considered: Decision No. 229 (1986), 2 W.C.A.T.R. 118 refd to; Decision No. 547/87 (1988), 8 W.C.A.T.R. 160 refd to; Decisions No. 313 refd to, 217/88 refd to, 674/89 refd to

Board Directives and Guidelines: Claims Services Division Manual: s. 3(1), p. 47, Directive 21; s. 3(1), p. 51, Directive 23

DECISION NO. 693/91 (24/12/91) Signoroni; Robillard; Barbeau

Supplements, older worker (age).

A construction worker suffered a low back injury in 1974 for which he was awarded a 15% pension, later increased to 30% and 40%. He retrained as a shoemaker and had his own business from 1978 until 1981 when he had to stop due to his back condition. He was awarded an older worker supplement in 1988 when he turned 55 years of age. The worker appealed a decision of the Hearings Officer denying the supplement from 1985.

Considering the worker's age, as well as his education and work experience, it was unlikely that the worker would benefit from another vocational rehabilitation programme. The worker's age was a significant factor, even though he was only 52 in 1985. The worker was entitled to the older worker supplement from 1985. The appeal was allowed. [7 pages]

WCAT Decisions Considered: Decision No. 320/88 (1988), 9 W.C.A.T.R. 292 apld; Decision No. 378/89 (1989), 1 W.C.A.T.R. 345 refd to; Decision No. 729/89 (1989), 12 W.C.A.T.R. 251 refd to

DECISION NO. 743/91L (24/12/91) Singh; Lebert; Chapman

Leave to appeal (good reason to doubt correctness) (Appeal Board procedure); Leave to appeal (good reason to doubt correctness) (natural justice); Natural justice (opportunity to make submissions).

The worker applied for leave to appeal a decision of the Appeal Board which denied benefits for a back condition subsequent of October 1977 which the worker related to a compensable accident in October 1975.

There was good reason to doubt correctness of the Appeal Board decision. The Appeal Board obtained post-hearing medical evidence from a Board doctor without giving the parties an opportunity to respond. The opinion of the Board doctor was central to the Appeal Board's decision.

Leave to appeal was granted. [8 pages]

WCAT Decisions Considered: Decision No. 131 (1986), 2 W.C.A.T.R. 77 refd to

DECISION NO. 872/89 (27/12/91) Kenny; B. Cook; Jewell

Tinnitus; Board Directives and Guidelines (tinnitus); Medical opinion (tinnitus); Hearing loss.

The worker appealed a decision of the Hearings Officer denying entitlement for tinnitus. The worker had sufficient noise exposure to cause hearing loss but was denied benefits for hearing loss since there was not sufficient hearing loss (average of 15 decibels in each ear) to qualify. According to the Board policy, benefits are not granted for tinnitus unless there is an acceptable claim for hearing loss.

The worker started hearing a sound about 10 years after he began working. It got progressively worse until 1975 when there was a dramatic increase in ringing after shots were fired from a gun to put holes in cement.

The Panel obtained a report from a medical assessor (with the consent of the worker and employer since the assessor had previously examined the worker). The assessor reviewed medical literature regarding a relationship between hearing loss and tinnitus. The Panel accepted his opinion that, in some cases, noise exposure can cause tinnitus even if the average hearing loss is less than 25 decibels and that hearing loss of less than 25 decibels may have considerable hearing loss at high frequencies which have been associated with tinnitus in some studies. The Panel also accepted the assessor's opinion that noise exposure probably was a significant cause of the worker's tinnitus.

The appeal was allowed. [16 pages]

WCAT Decisions Considered: Decision No. 257/89 (1990), 14 W.C.A.T.R. 87 *reld* to
Board Directives and Guidelines: Claims Services Division Manual, s. 122, p. 270, Directive 19

DECISION NO. 292/91 (27/12/91) Signoroni; Robillard (dissenting); Nipshagen

Availability for employment; Investigation by Tribunal (inspection).

The worker suffered a compensable injury in December 1985. The worker appealed a decision of the Hearings Officer denying continuing entitlement to temporary benefits from November 1987 to January 1988.

In November 1987, the worker was capable of modified work that did not involve above head or above shoulder movement. In accordance with a posting practice, the worker selected a job securing engine mounts. The employer's placement coordinator would not let the worker take that job since he felt it was not suitable.

In order to satisfy itself about the suitability of the job, the Panel inspected the workplace. The majority found that the job selected by the worker was not suitable. Given the worker's seniority, there were a number of other suitable jobs which the worker could have chosen. However, it appeared that he did not choose other jobs because he did not want to change shifts. The majority found that the worker was not available for suitable available work. Accordingly, he was not entitled to temporary benefits during the period in question.

The appeal was dismissed.

The Worker Member, dissenting, found that the worker wanted to try the job to see if it was suitable and that he did not know that it was outside his medical restrictions. Further, he made himself available for employment and actively pursued the placement coordinator for work. [9 pages]

DECISION NO. 120/90R (30/12/91) Kenny; Robillard; Nipshagen

Reconsideration (consideration of evidence); Evidence (rejection of direct testimony).

The worker's request to reconsider Decision No. 120/90 was denied. In Decision No. 120/90, the hearing panel denied entitlement for retinal detachment which the worker related to medication taken for a compensable chest condition. New evidence submitted by the worker as to medication did not seriously challenge the more probable explanation for the retinal detachment of age-related lattice degeneration.

The hearing panel explained why it preferred written records to the worker's testimony. The hearing panel found the worker to be honest but that he was attempting to recall medications prescribed 20 years before the hearing. [6 pages]

WCAT Decisions Considered: 120/90 refd to

DECISION NO. 633/90 (30/12/91) Starkman; Beattie; Preston

Maximal medical rehabilitation.

The Panel considered whether the worker had reached maximal medical rehabilitation so that he could be assessed for a pension.

The worker could undergo dental implant surgery but was refusing to do so. The Panel found that this was an invasive procedure with a risk of causing further damage. In the circumstances, it was not prepared to require the worker to undergo the procedure. Therefore, the worker had achieved maximal medical rehabilitation and was entitled to be examined for a pension. [4 pages]

WCAT Decisions Considered: 633/90 refd to

DECISION NO. 187/91 (30/12/91) Newman; M. Cook; Barbeau

Medical report (clinical notes); Credibility; Benefit of the doubt.

The employer appealed a decision of the Committee to Review Appeal Board Decisions granting entitlement for a torn meniscus. The issue was whether the knee condition was caused by an accident at work on January 12, 1982. The worker saw his doctor on January 18. There was no mention of a knee problem in the doctor's clinical notes until July 1982.

The doctor had no personal recollection of the events but testified that his clinical notes were accurate. The record indicated that the worker was having a problem with swollen varicose veins. It contained no reference to the worker complaining about his knee. In fact, it included a specific reference that there was not a knee problem.

The worker, his wife and a neighbour all gave credible evidence of complaints regarding the knee immediately after the accident. This was confirmed by a physiotherapy report.

Applying the benefit of doubt in favour of the worker, the Panel found that the worker was entitled to benefits. The appeal was dismissed. [7 pages]

DECISION NO. 371/91 (30/12/91) Moore; Ferrari; Chapman

Delay (claim); Evidence (corroboration).

The employer appealed a decision of the Hearings Officer granting entitlement for an ankle condition. The worker claimed that he suffered the ankle injury in May 1987. He did not submit a claim until October 1988.

There were inconsistencies in the worker's evidence. Without corroboration, the Panel would have had difficulty accepting the worker's claim. However, there was corroboration from a lead hand, who was not the worker's direct supervisor, that the worker reported an ankle injury in 1987. There was no reason to reject the lead hand's testimony. The employer attempted to show that there was a social relationship between the lead hand and the worker but the Panel found no indication of a relationship sufficiently close to support an inference of fabrication. The medical evidence indicated that the worker's condition was consistent with an injury in 1987.

The appeal was dismissed. [7 pages]

DECISION NO. 744/91 (30/12/91) Newman; Beattie; Jago

Re-employment (reinstatement); Re-employment (notice from Board) (form of notice); Re-employment (determination re return to work); Re-employment (exemption) (number of workers); Alternative employment; Re-employment (non-compliance) (penalty).

The employer appealed a decision of the Reinstatement Officer finding that the employer failed to fulfil its obligations under s. 54b of the pre-1990 Act. The employer was in the business of diamond drilling. On March 29, 1990, the employer informed the worker that his job as a fieldman was being eliminated due to economic circumstances. The worker was verbally offered a job as a driller and he said he would think about it. On April 5, 1990, the worker was injured in a compensable accident. From April to July, the employer continued to lay off workers for bona fide business reasons. On July 30, 1990, the Board sent a notice that the worker was fit to perform the essential duties of his pre-accident job.

The Board's notice of fitness was valid. The inquiry and information gathering process to make the determination of fitness need not be elaborate or exhaustive but it must be sufficient so that the determination may be properly and carefully made. In this case, the Board had obtained sufficient information by telephone to make the determination.

The notice included a statement that the employer was obligated to reinstate the worker if three conditions were met, including that the employer "employ 20 workers or more". When the notice was received the employer had reduced its staff to less than 20 workers. There was no statutory obligation to include this information in the notice. The information was not entirely consistent with the Board's interpretation of the provision in s. 54b(16) that the employer "regularly employ" less than 20 workers. On the facts, the Panel found that the employer was not misled by the notice. The employer had begun discussions about reinstatement when it received the notice and acted in a manner that indicated that it understood its obligation to re-employ.

The obligation to re-employ applied in circumstances where the pre-injury job was no longer in existence. In such circumstances, the obligation is to offer alternative comparable employment. The position of driller was alternative comparable employment.

The employer believed that the worker rejected the job as a driller offered in March 1990. The worker and the employer entered into negotiations for purchase of the worker's home by the employer so that the worker could move, in return for which the worker would withdraw the complaint under s. 54b. However, their

lawyers could not come to a written agreement to implement the verbal agreement of the parties. The Panel found that the employer failed to meet its obligations under s. 54b. It had a duty to make a clear, unconditional offer to reinstate, regardless of any prior discussions or negotiations.

The Reinstatement Officer imposed a penalty of 50% of the worker's net average earnings for the preceding year as well as awarding benefits equivalent to s. 40 benefits. The Panel reduced the penalty to \$2,500 due to the employer's poor financial situation and due to the employer's lack of bad faith. The benefits awarded to the worker were confirmed. The appeal was allowed in part. [15 pages]

Ss: 54(4) [54b(4) pre-1990], 54(16) [54b(16) pre-1990]

WCAT Decisions Considered: 372/91 consd

Board Directives and Guidelines: Operational Policy Manual, Document no. 07-05-02

DECISION NO. 881/91 (30/12/91) Newman; Ferrari; Jago

Withdrawal (of appeal).

The worker's appeal of denial of temporary total disability benefits was withdrawn when the Board granted the worker a pension and was considering award of a supplement. [3 pages]

DECISION NO. 631/90R (31/12/91) Moore; Lebert; Apsey

Reconsideration (consideration of issue).

The worker's application to reconsider Decision No. 631/90 was denied. In Decision No. 631/90, the hearing panel denied a commutation of the worker's 10% pension. Since the pension was for 10%, the matter should have been considered under s. 45(4) of the pre-1989 Act. The hearing panel found that the commutation was not in the worker's long term rehabilitative interest, which was not necessarily an appropriate consideration for a request under s. 45(4). However, the hearing panel also found that there was a likelihood of deterioration of the worker's condition and that, therefore, it was not to the advantage of the worker to grant the commutation. Accordingly, there was no reason to find that the hearing panel was incorrect. [6 pages]

WCAT Decisions Considered: Decision No. 72R (1986), 18 W.C.A.T.R. 1 *reld to*; Decision No. 72R2 (1986), 18 W.C.A.T.R. 26 *reld to*; Decision No. 95R (1989), 11 W.C.A.T.R. 1 *reld to*; Decision No. 223/89 (1989), 11 W.C.A.T.R. 302 *reld to*; Decision No. 631/90 *reld to*

Board Directives and Guidelines: Operational Policy Manual, Document no. 05-03-08

DECISION NO. 665/90 (31/12/91) Kenny; Robillard; Shuel

Chronic pain (marked life disruption); Pensions (assessment) (whole person concept).

The worker suffered back injuries in compensable accidents in 1973, 1975 and 1983. He was awarded a 20% pension for organic back disability resulting from the 1973 and 1975 accidents. The worker appealed a decision of the Hearings Officer denying an increase in the pension for organic disability and denying entitlement for chronic pain.

The Panel took a whole person approach to the issue of the rating for the worker's back disability. The 20% rating, first awarded in 1977, was confirmed on three further examinations. Reports indicated no significant change in physical findings. Changes that did occur were attributed to increases in non-organic complaints. The evidence did not establish that the worker's organic disability was greater than 20%.

If, however, the complaints were accepted as being genuine and arising from an organic source, the disability would be rated at more than 20%. The Panel noted that the 20% rating probably did not compensate for leg symptoms which were attributed to a non-organic basis. If these leg symptoms had been accepted as compensable, a greater pension would have been appropriate.

Although there was some concern as to the worker's credibility and his motivation, the Panel found that some of the non-organic disability was genuine, considering evidence of marked life disruption, an increase in prescribed medication and recent medical reports. This chronic pain condition was related to the 1973 and 1975 accidents and resulting back surgery.

The appeal was allowed in part. The matter was referred to the Board to reassess the worker using a whole person approach and including the chronic pain component of his disability. [23 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 *reld to*; Decision No. 915A (1988), 7 W.C.A.T.R. 269 *reld to*
Cases Considered: Review of Decisions No. 915 and 915A (1990), 15 W.C.A.T.R. 245 (WCB Bd. of Directors) *reld to*

DECISION NO. 744/90 (31/12/91) McIntosh-Janis; Lebert; Nipshagen

Hearing loss (asymmetrical).

A police officer was exposed to noise from firearms when he had to take target practice twice per year. In 1982, he was granted entitlement to health care benefits for hearing loss of 25 decibels bilaterally. In 1987, his hearing had deteriorated to 30 decibels in the right ear and 45 decibels in the left ear. The worker appealed a decision of the Hearings Officer denying further entitlement.

The preponderance of medical evidence supported the view that the asymmetrical deterioration of hearing in the left ear beyond that of the right ear was not caused by noise exposure. Although there was evidence that a right-handed person, such as the worker, would expose his left ear to more noise than the right ear when shooting a rifle, the evidence indicated that the worker practised mostly with a pistol which would expose the ears more evenly. Further, the late onset of asymmetry indicated that the asymmetrical loss was not compensable.

The appeal was dismissed. The deterioration of hearing in the left ear beyond that in the right ear was not compensable. The matter was referred back to the Board to consider entitlement for the bilateral deterioration (to 30 decibels in 1987). [9 pages]

DECISION NO. 522/91I2 (31/12/91) Moore; Robillard; Barbeau Bruce R. Smith Ltd. v. Brown

Right to sue; Standing; Intervenors; Parties; Procedure (right to sue) (witnesses) (summary of evidence).

The defendants in a civil action brought an application under s. 15 of the pre-1990 Act to determine whether the plaintiff's right of action was taken away. In this decision, the Panel considered a number of preliminary matters.

In accordance with the Tribunal's Practice Direction, the Panel gave directions regarding the provision of a witness list including a summary of points that each witness will make in testimony.

The issue on the application was whether the plaintiff was a worker or independent operator. A company, alleged to be the plaintiff's employer, applied for standing on the application. The company was currently involved in an appeal before the Board concerning its status as an employer. There was also a request by the plaintiff to allow other persons to intervene who had the same relationship to this company as the plaintiff.

The Panel decided that the company had standing since it had a significant interest in the outcome of the application. It could be adversely affected by a finding in these proceedings before the Tribunal. The company could make submissions and present evidence relating to the issue of whether it was the employer of the plaintiff.

The other persons with similar relationships did not have standing since it was not established that they had a significant interest. A finding regarding the status of the plaintiff would not be binding regarding the status of these other persons. Further, these persons were not granted intervenor status. It was not shown that they had any special expertise or insight that would be helpful in resolving the issues in the case. The plaintiff could call them as witnesses if he thought they had valuable evidence.

The Panel would not delay the hearing of the application until the Board makes its decision regarding the company's status since it would cause substantial delay. [11 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to; Decision No. 94/90I (1991), 18 W.C.A.T.R. 161 apld; Decisions No. 356 reld to, 107/87 reld to, 108/87 reld to, 55/89I reld to, 311/89 reld to, 208/90I reld to, 404/91I reld to, 522/91I reld to
Practice Directions Considered: Practice Direction: Applications Pursuant to Section 15 (1991), 18 W.C.A.T.R. 363; Practice Direction No. 7 (1986), 1 W.C.A.T.R. 231

DECISION NO. 785/88R (02/01/92) B. Cook; M. Cook; Barbeau

Impotence; Pensions (assessment) (impotence); Impairment of earning capacity (impotence); Reconsideration.

In Decision No. 785/88, the hearing panel found that the worker suffered organically based impotence resulting from compensable surgery but denied a pension for impotence since it was not shown that the worker experienced an impairment of earning capacity. In Decision No. 785/88RI, it was decided to reconsider that decision.

Pensions under s. 45 of the pre-1989 Act are not intended to compensate for actual loss of earnings which a particular injury causes to a particular worker. Rather, the pension represents the impairment of earnings which would be caused to the average unskilled worker. A particular worker would be entitled to a pension for a particular condition even if that worker returned to work with no impairment of earnings at all.

Impotence does not cause a direct impairment of earning capacity in the average unskilled worker. However, it causes an indirect psychological reaction in the average unskilled worker. This is the basis for payment of a pension for impotence.

The normal psychological reaction to a particular injury is built into the percentages in the Rating Schedule. A psychological reaction attracts a separate pension only when the reaction becomes more disabling than that experienced by the average unskilled worker. This principle applies to impotence as well. There is an award for the normal psychological reaction of the average unskilled worker. A worker might be entitled to a separate pension for psychological disability if the worker developed a reaction significantly beyond the typical reaction.

The worker was entitled to a 10% pension for impotence, in accordance with Board policy. [8 pages]

Ss: 45(1) pre-1989

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 refd to; 785/88R1 (1991), 19 W.C.A.T.R. 61 refd to; Decision No. 785/88 not foll'd

Cases Considered: Decision No. 157 (1975), 2 B.C.W.C.R. 198 consd

DECISION NO. 490/91I2 (02/01/92) Robeson; Robillard; Ronson

Adjournment (referral to Board).

The worker's appeal regarding ongoing entitlement was adjourned to allow the Board to complete an assessment for chronic pain. The parties may return to the Tribunal after a decision of the Board's Decision Review Specialist, at which time the Tribunal will decide how to proceed. [5 pages]

DECISION NO. 774/91 (02/01/92) Newman; Crocker; Meslin (dissenting)

Evidence (weight); Evidence (rejection of direct testimony); Evidence (hearsay); Credibility.

The issue was whether or not the worker injured his thigh in the course of employment.

The majority of the Panel found that the worker injured his thigh on July 2 when he climbed into a front-end loader at work, rather than at the end of July while he was moving house. The Panel preferred the direct evidence of the worker and his girlfriend, that the worker did not participate in the move. Their evidence was given straightforwardly and credibly. It was not eroded by cross-questioning.

The evidence of the worker's supervisor at the hearing, that the worker did not report a work accident on July 2, conflicted with a letter that was prepared on the basis of information that the supervisor himself had supplied. Unsigned "absence reports" prepared by another supervisor indicated that the worker was absent because of an injury during the move. As this supervisor was not called to testify at the hearing, the reports could be characterized as hearsay. Such evidence was admissible, but because it could not be tested by cross-questioning of the person who prepared it, this documentary evidence carried less weight than the direct testimony of the worker and his girlfriend.

The worker's appeal was allowed and he was entitled to benefits.

The Employer Member, dissenting, would have dismissed the appeal. Even direct evidence that is given in a credible manner at a hearing must be assessed for reasonableness in the context of the entire body of evidence before an adjudicator. The evidence of the worker and his witnesses was not unimpeachable.

Though alleging a July 2 accident date, the worker did not seek medical attention until July 24, meanwhile continuing to perform his regular work which was physically demanding. The worker testified that he may have driven the truck during the move but did not lift anything. His girlfriend testified unequivocally that he was not present at all during the move.

The unsigned absence report had to be looked at critically, but there was other testimony and documentary evidence that supported it. A July 24 hospital report indicated that the worker's thigh injury was not worker's compensation-related.

On reviewing the evidence, the Employer Member concluded that there was a very minor injury on July 2 at work which was followed by a second injury, probably while the worker was moving furniture on July 22. [16 pages]

WCAT Decisions Considered: 506/90 consd Cases Considered: Faryna v. Chorny [1952] 2 D.L.R. 354 (B.C.C.A.) consd; Phillips v. Ford Motor Co. of Canada (1971), 18 D.L.R. (3d) 641, [1971] 2 O.R. 637 (Ont. C.A.) consd

DECISION NO. 788/91 (06/01/92) Sandomirsky; Robillard; Nipshagen

Suitable employment; Medical restrictions (repetitive bending and lifting).

The worker suffered three compensable back injuries between April 1982 and August 1983. He appealed the denial of benefits for periods commencing in November and December of 1983.

The fact that the worker continued to bowl competitively four nights per week raised doubts about the worker's claim that he was unable to do work offered by the accident employer because of the twisting and bending involved. The reports of one doctor who was supportive of the worker were based on the worker's complaints rather than on medical findings. Another report supporting the worker's claim that he could not do work involving repetitive twisting and bending was based on the doctor's conclusion that the worker had sustained an acute ligamentous strain. The Panel did not accept that conclusion. The worker's treating physicians noted few physical findings.

The Panel did not accept that the worker was unable to work for two days in 1983 because of stomach problems related to his back medication. No reference was made of this in medical reports until 1988.

The appeal was dismissed. [9 pages]

DECISION NO. 794/91 (06/01/92) Sandomirsky; Robillard; Nipshagen

Continuing entitlement.

The worker suffered a compensable back injury in August 1983. He returned to his regular employment in October 1983 and was able to continue there until he suffered a compensable arm injury in June 1986. The worker did not renew treatment for back and leg pain until July 1987.

The worker was not entitled to further benefits for his low back condition after November 1988. The worker had a pre-existing degenerative condition that was both symptomatic and severe. A myelogram and CT scan in 1981 revealed significant spinal canal stenosis and a disc herniation. The worker's 1983 work injury was relatively minor, with only two months of lost time. There was no continuity of complaint between 1983 and 1987. The workers' ongoing problems were likely related to the progression of his pre-existing herniations and degenerative disc disease. [7 pages]

DECISION NO. 865/91 (07/01/92) McIntosh-Janis; Crocker; Ronson

Availability for employment.

The worker appealed a decision of the Hearings Officer denying full temporary partial disability benefits from July to December 1988. The worker was temporarily partially disabled during the period in question. The Board denied benefits after the worker signed a "buyout agreement" agreeing not to continue to seek employment with the employer.

On the evidence, the worker wanted to return to work. He signed the buyout agreement since it was unlikely that the employer would ever have suitable work for him. After signing the agreement, he did not look for modified work. However, this was reasonable considering his severe medical restrictions and the advice of his doctors. He requested Board assistance, but none was forthcoming.

The worker operated a small business from his home. However, he did not want to pursue only this business venture.

In the circumstances, he was not disentitled from receiving full benefits. The appeal was allowed. [7 pages]

DECISION NO. 874/91 (07/01/92) B. Cook; Lebert; Apsey

Disablement (repetitive work); Significant contribution (of employment to disability).

The worker was a processor of chicken meat. She appealed a decision of the Hearings Officer denying entitlement for a condition, diagnosed as myofascial pain syndrome, which she related to the nature of her work.

The Panel found that the worker likely developed some pain and numbness from the nature of her work. This sort of problem was common among workers who started work for the employer. However, the nature of the work was not a significant contributing factor to development of the worker's condition. The condition would not have become disabling without substantial non-work stresses in the worker's life. The breakup of the worker's marriage and some preexisting health problems were the significant factors.

The appeal was dismissed. [8 pages]

DECISION NO. 912/91 (07/01/92) McGrath; M. Cook; Howes

Access to worker file, statutory.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 913/91 (07/01/92) McGrath; M. Cook; Howes

Access to worker file, statutory.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 914/91 (07/01/92) McGrath; M. Cook; Howes

Access to worker file, statutory.

Access to the worker's file was granted to the employer, except for reports subsequent to a specified date which were not relevant to the issue of restoration of benefits for a period prior to that date. [3 pages]

DECISION NO. 899/91 (08/01/92) Robeson; Robillard; Howes

Access to worker file, statutory.

Access to the worker's file was granted to the employer, except for a reference which was not relevant. [4 pages]

DECISION NO. 307/89 (10/01/92) Newman; Lebert; Preston

Cancer (lung); Exposure (coke oven emissions); Exposure (welding fumes); Exposure (synergism); Evidence (epidemiological).

The worker's widow appealed a decision of the Hearings Officer denying benefits for the worker's death by lung cancer. The Panel adopted findings of fact made by a different Panel in Decision No. 307/89I. In that interim decision it was found that: the worker had side oven exposure to coke oven emissions for six years over a 20 year period; the worker was also exposed to welding fumes; the worker died from invasive bronchioloalveolar carcinoma.

The Panel reviewed the evidence, including epidemiological studies and the report of a medical assessor. The worker did not meet the exposure requirements of Board guidelines. The worker's cancer was not inconsistent with the kind of cancer resulting from exposure to hazardous levels of coke oven emissions neither had it been specifically associated with coke oven emissions. The medical assessor found that, as a side oven worker, the worker's risk of lung cancer was doubled. However, the Panel found that the worker's exposure was close to that of a "side oven 2 worker" in one of the epidemiological studies. This involved intermittent side oven exposure and involved approximately half the exposure of a "side oven 1 worker". The worker was not within a category of quantifiable risk.

The Panel could not find a significant connection between the worker's exposure history and the cancer from which he suffered. Although, it was theoretically possible for relatively low exposure to coke oven emissions to play a role in the development of lung cancer, the Panel could not conclude on a balance of probabilities that exposure to coke oven emissions was a significant contributing factor in this case.

There was no consensus among medical authorities as to a relationship between exposure to welding fumes and cancer. The worker had occasional intermittent exposure to stainless steel welding fumes. Much of this work was performed outside where there was good ventilation. The Panel concluded that exposure to welding fumes was not a significant contributing factor to development of the worker's cancer.

A synergistic effect of coke oven emissions and welding fumes could not be established. There was insufficient evidence to establish that exposure to low dosages of these substances was a significant contributing factor.

The appeal was dismissed. [21 pages]

WCAT Decisions Considered: 118/87 *refd to*, 764/87L *refd to*, 31/88 *refd to*, 307/89I *refd to*, 307/89I2 *refd to*, 307/89I3 *refd to*

Cases Considered: *American Iron and Steel Institute v. Occupational Safety and Health Administration*, United States Department of Labor, 577 F. 2d 825 (1978) *consd*; *Farrell v. Snell*, [1990] 2 S.C.R. 311 *consd*

DECISION NO. 635/88R (13/01/92) Signoroni; Robillard; Preston

Reconsideration (consideration of evidence); Ombudsman.

The request to reconsider Decision No. 635/88 was denied. The hearing panel considered the evidence and arrived at a conclusion based on that evidence. There was no significant defect in the process or content of the decision. [6 pages]

WCAT Decisions Considered: Decision No. 72R (1986), 18 W.C.A.T.R. 1 *refd to*; Decision No. 72R2 (1986), 18 W.C.A.T.R. 26 *refd to*; Decision No. 95R (1989), 11 W.C.A.T.R. 1 *refd to*; Decision No. 635/88 *refd to*

DECISION NO. 760/90 (13/01/92) Kenny; Higson; Chapman

Chronic pain (marked life disruption).

The worker appealed a decision of the Hearings Officer denying entitlement for chronic pain, which the worker related to an accident at work in 1982. The worker gave evidence of marked life disruption after the accident. Considering medical and work records, the Panel found that the worker's condition did not change after the accident. There were a number of personal problems already existing prior to the accident. The Panel concluded that the worker's chronic pain was not related to the 1982 accident. The appeal was dismissed. [12 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 03-03-05

DECISION NO. 499/91 (13/01/92) Onen; Shartal; Jago

Earnings basis (short or casual employment); Earnings basis (overtime); Overpayment.

The employer appealed a decision of the Hearings Officer regarding the earnings basis for calculation of the worker's benefits. The worker was employed as a stevedore at the time of the accident on December 12, 1987. He had been working for the employer for 32 hours over five days from December 7, 1987. The Hearings Officer calculated benefits based on the actual 32 hours of work from December 7 to December 12.

The shipping season usually runs from April 10 to December 20. According to a collective agreement, union members had first priority in hiring, followed by a reserve labour pool. In addition, casual employees were hired if the first two groups could not fulfil the employers' labour requirements. The casual employees could be further divided into those that worked on a reasonably regular basis and those who only worked at peak times for a few days during the entire season.

The worker was one of the casual employees. The employer provided records of four workers that it considered typical of casual workers who worked on a reasonably regular basis. On average, they worked between 12 and 16 hours per week over the shipping season.

The Panel found that a pattern of employment could not be determined from the actual hours worked by the worker (during peak time before close of the shipping season). Therefore, s. 43(1)(a) of the pre-1990 Act could not apply. The Panel applied s. 43(2), finding that the figures supplied by the employer were typical of a comparable worker.

Since overtime or shift premiums were common among regular casual workers, overtime pay should be included in the earnings basis. The Panel noted that overtime pay was included in the figures supplied by the employer. The Panel averaged the average weekly earnings of the four workers in the employer's figures and arrived at an earnings basis for the worker.

The appeal was allowed. In accordance with Board policy, the overpayment to the worker should not be recovered. [14 pages]

Ss: 40(1) [43(1) pre-1990], 40(2) [43(2) pre-1990]

WCAT Decisions Considered: Decision No. 629/88 (1989), 12 W.C.A.T.R. 55 *reld* to

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33/08/06; Operational Policy Manual, Document no. 05-02-02

DECISION NO. 670/91 (13/01/92) Onen; Shartal; Barbeau

Delay (treatment); Disability (disabled from working).

The worker appealed a decision of the Hearings Officer finding that the worker slipped and fell at work in January 1990 but that he did not suffer an injury.

The worker did not report the injury until March 1990. Evidence of the worker's doctor indicated that, although the worker was seen in January and February, he did not complain of back pain. There were inconsistencies in the worker's evidence.

Even if the worker did have an accident in January 1990, no personal injury resulted. The appeal was dismissed. [11 pages]

DECISION NO. 780/91 (13/01/92) Moore; M. Cook; Apsey

Continuity (of symptoms); Overpayment; Administrative Fund (transfer of costs).

The worker suffered a low back injury in January 1979 and received benefits until February 1979. He was granted further benefits from November 1981 to January 1983 but this award was retroactively denied after further investigation. The worker appealed the decision of the Appeals Adjudicator denying benefits subsequent to November 1981.

Considering that the worker was able to return to regular work after the accident and considering lack of continuity of treatment, the Panel found that the worker's condition had resolved by February 1979 and that he was not entitled to benefits subsequent to November 1981.

The appeal was dismissed. The Panel directed that the overpayment not be recovered, considering financial hardship to the worker and considering the indecision of the Board in dealing with the claim. The Panel also directed that the costs of the claim be transferred to the Administrative Fund. [9 pages]

WCAT Decisions Considered: Decision No. 431/89 (1989), 11 W.C.A.T.R. 355 *reld to*; Decisions No. 556/90 *reld to*, 792/90 *consd*
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Documents no. 33-02-34, 33-18-05

DECISION NO. 843/91 (13/01/92) B. Cook; Crocker; Jago

Medical examination (employer request) (medical tests).

The employer applied for an order requiring the worker to attend a medical examination. An open lung biopsy (which the worker refused to undergo) was the only way to confirm a diagnosis of mushroom workers lung. However, the employer-selected doctor felt that pulmonary function tests would still be of value to see if lung function had changed since removal from exposure.

The most recent pulmonary function test was performed by the worker's family doctor. The Panel felt that tests by a specialist would be preferable. The worker did not object to undergoing further pulmonary function tests.

The Panel ordered the worker to attend for pulmonary function testing under the direction of the employer-selected doctor. The worker was not required to undergo a medical examination other than the tests. [7 pages]

WCAT Decisions Considered: Decision No. 174 (1986), 2 W.C.A.T.R. 96 *reld to*

DECISION NO. 691/91 (14/01/92) Faubert; Jackson; Nipshagen

Temporary partial disability; Availability for employment.

The worker experienced pain in his right elbow during his shift on August 17, 1989. He completed the shift, performing light duties. He missed his next two shifts, then returned to light work for shifts on August 21 and 22. He went to the doctor on August 22. The worker appealed a decision of the Hearings Officer denying entitlement to benefits from August 17 to August 20.

The worker's doctor indicated that the worker was capable of modified work. The worker gave no satisfactory explanation for missing two shifts but working two other shifts before seeing his doctor. The Panel found that the worker was temporarily partially disabled during the period in question and capable of performing light duties. The same light work that was given to the worker at no wage loss on the shifts he did work would have been available on the other shifts. However, the worker simply phoned saying he would not be in. The Panel concluded that the worker was not available for suitable modified work. He was disqualified from receiving full temporary partial disability benefits.

The appeal was dismissed. [5 pages]

DECISION NO. 858/91 (14/01/92) McGrath; Robillard; Howes

Recurrences (compensable injury) (disc, degeneration).

The worker suffered compensable back injuries in 1958, 1962 and 1974. The worker appealed a decision of the Hearings Officer denying benefits for a lay-off in 1982.

The worker was suffering from degenerative disc disease. There was no degenerative disc disease present in x-rays taken immediately after the 1958 accident but it was evident by the time of the accident in 1962. The ongoing development of extensive degenerative disc disease in the lumbar area was consistent with the area injured in the accidents. The Panel found that the compensable accidents were a significant contributing factor to the development of degenerative disc disease. It was the extent of degenerative disc disease that caused the worker to lay-off in 1987.

The appeal was allowed. [11 pages]

DECISION NO. 928/91 (14/01/92) McCombie; Robillard; Barbeau

Accident (occurrence); Hernia (inguinal).

The worker appealed a decision of the Hearings Officer denying entitlement for an inguinal hernia. The worker performed a reasonably stressful job activity, pulling brake cables. The Panel concluded that the hernia likely resulted from a specific pull. The appeal was allowed. [5 pages]

DECISION NO. 5/92 (15/01/92) Newman; Lebert; Apsey

Disablement (repetitive work).

The worker appealed a decision of the Hearings Officer denying entitlement for a bilateral wrist condition which the worker related to the repetitive nature of his work.

The worker performed a variety of functions at work, including collection of garbage, cleaning, sweeping floors, performing general maintenance and acting as a doorman. The work did not involve repetitive trauma by isolated motion to any part of the body. The appeal was dismissed. [5 pages]

DECISION NO. 339/89R (16/01/92) McIntosh-Janis; Thompson; Preston

Reconsideration (procedural error) (notice); Issue setting; Natural justice (opportunity to make submissions); Reconsideration (new evidence).

This application for reconsideration of Decision No. 339/89 commenced with a letter from the Ombudsman. The worker supported the Ombudsman's tentative conclusion questioning the correctness of the decision. All parties were invited to make submissions.

The issue as stated in the Case Description before the original Panel was limited to the worker's continuing entitlement to benefits for a psychiatric condition "subsequent to 1978". The original Panel expanded the issues to include initial entitlement to benefits for a psychiatric disability, without notifying the parties. This was a breach of natural justice. The parties did not have an opportunity to make submissions on this issue and therefore did not have a full and fair hearing. Before expanding the issues, a panel has to consider: the parties' views as to the issues which should be addressed, whether the issues were expressly or impliedly present in the Hearings Officer's decision, and what the panel has to consider in deciding the real merits and justice of the appeal. It is crucial that those at the hearing understand what issues the hearing panel intends to decide before the hearing begins.

In this case, the original Panel considered initial entitlement but did not interfere with the pension award. It confirmed the Board's award of a two year psychological pension on the basis of therapeutic reasons to treat a non-compensable condition that hindered the worker's recovery, rather than on the basis of a compensable psychiatric condition related to his accident. Though the final result was apparently the same, the choice of one of these two alternative bases for confirming the initial award would affect the way the claim for continuing entitlement would be considered. The focus of the of the Panel's line of inquiry would change dramatically.

The only way to remedy this procedural defect was to order a rehearing of the case before another panel of the Tribunal.

Also, the absence from the Case Description, of letters by the worker which called into question the original Panel's finding that there were no symptoms of psychological disturbance until October 1975, warranted reopening the appeal

The application for reconsideration was allowed. [10 pages]

WCAT Decisions Considered: Decision No. 339/89 (1990), 13 W.C.A.T.R. 169 refd to; Decision No. 405/88R apld

DECISION NO. 18/91R (16/01/92) B. Cook; Jackson; Chapman*Reconsideration.*

The employer's request to reconsider Decision No. 18/91 was denied. [3 pages]

WCAT Decisions Considered: Decision No. 72R (1986), 18 W.C.A.T.R. 1 refd to; Decision No. 72R2 (1986), 18 W.C.A.T.R. 26 refd to; Decision No. 95R (1989), 11 W.C.A.T.R. 1 refd to; Decision No. 850/87R (1990), 14 W.C.A.T.R. 1 refd to; Decision No. 18/91 refd to

DECISION NO. 817/91 (16/01/92) McGrath; Jackson; Chapman*Temporary disability (beyond pension level).*

The worker suffered a hand injury in 1977. She was awarded a 15% pension for reflex sympathetic dystrophy. The worker appealed a decision of the Hearings Officer denying temporary benefits from October 1986 to November 1986. On the evidence, the Panel found that the worker's condition deteriorated to the point that she was temporarily totally disabled during the period in question. After the period, there were changes in the workplace that enabled the worker to continue working. The appeal was allowed. [5 pages]

DECISION NO. 904/91 (16/01/92) Onen; Lebert; Seguin*Accident (occurrence); Benefit of the doubt.*

The worker appealed a decision denying him benefits for a back condition. The worker claimed that he was injured on a Friday afternoon while pushing a loaded buggy up a ramp. He stated that the ramp was loose and when it moved he slipped. The worker reported the injury the next Monday. There was evidence that the worker injured his back while playing broomball during the intervening weekend.

The Panel heard testimony from co-workers and broomball team-mates of the worker. Only one team-mate consistently stated that the worker suffered a back injury while playing, but he could not recall the date or even the year of the injury. The employer's report to the Board and the worker's own reports to the Board were consistent with the worker's version of the events.

The evidence for and against the claim was approximately equal in weight. Applying the benefit of the doubt under s. 3(4) of the pre-1990 Act, the worker's appeal was allowed. [7 pages]

DECISION NO. 924/91I (16/01/92) McIntosh-Janis; M. Cook; Ronson*Adjournment (additional evidence).*

The worker was appealing denial of a temporary supplement subsequent to March 1990. The worker intended to focus on rehabilitation efforts from 1988 to 1990. The Panel felt it should have the full history of the worker's involvement with vocational rehabilitation since the accident in 1982. Some of this material was missing. The hearing was adjourned to try to obtain the missing material from the Board. [4 pages]

WCAT Decisions Considered: Decision No. 212/88 (1988), 9 W.C.A.T.R. 248 consd

DECISION NO. 2/91 (17/01/92) Robeson; Robillard; Nipshagen

Access to worker file, statutory.

In Decision No. 2/91I, access to three documents was withheld because the documents were illegible. After obtaining legible copies, the Panel found that the documents were relevant to the issue in dispute and granted access to the employer. [4 pages]

WCAT Decisions Considered: 2/91I refd to

DECISION NO. 873/91 (17/01/92) Signoroni; Robillard; Nipshagen
Robson v. Ball

Right to sue; In the course of employment (status).

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken away. The issue was whether the plaintiff was in the course of employment at the time of a motor vehicle accident.

The plaintiff worked for her husband. The husband was called away by a family emergency. He gave his wife instructions as to what to do in his absence. The plaintiff submitted that while her husband was away, she was acting as the employer. The Panel found that the plaintiff was a worker at the time of the accident. The instructions from her husband were not sufficient to change her employment status. She was engaged in a work related activity at the time of the accident. Her right of action was taken away. [7 pages]

DECISION NO. 900/91 (17/01/92) Onen; Lebert; Seguin

Earnings basis (short or casual employment); Earnings basis (seasonal employment).

The worker appealed a decision of the Hearings Officer regarding the earnings basis for calculation of benefits. The worker was a cutter in the bush. He was injured in 1963 after working three months for the employer.

Of the three months the worker was employed, he was unable to work for 23 days. These days off resulted from reasons such as machinery breakdowns and holidays, and were all unpaid. Pursuant to Board policy at the time, these days should not be included in the calculation of the worker's earnings base.

The Board found that the worker's employment was seasonal and made its determination on the basis that the worker's earnings would have been his entire earnings for the year. The Panel found that the worker was able to do other piece work and carpentry work during periods that he was not cutting.

The Board found that it was impracticable to calculate the worker's earnings and applied the section providing for having regard to other worker's comparable earnings. The Panel found that the worker had been employed long enough to establish a working pattern. The worker's period of employment, though less than 12 months, could be used to calculate his earnings basis.

The appeal was allowed. [10 pages]

WCAT Decisions Considered: Decision No. 994/88 (1989), 12 W.C.A.T.R. 61 refd to; Decision No. 303/90 (1990), 15 W.C.A.T.R. 187 refd to
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-08-07

DECISION NO. 1/92 (17/01/92) McIntosh-Janis; Crocker; Jago

Withdrawal (of appeal) (adequacy of representation); Parties (representation) (adequacy).

The appeal was withdrawn to allow the worker to pursue entitlement for psychological disability and chronic pain at the Board.

The Panel noted the inadequate representation by the worker's representative who did not review the issues under appeal until two weeks before the hearing, did not inform the Tribunal of all issues that the worker wanted to appeal, did not provide the Board or the Tribunal with medical reports that he had obtained and did not communicate adequately with the worker. [4 pages]



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Decision Digest Service

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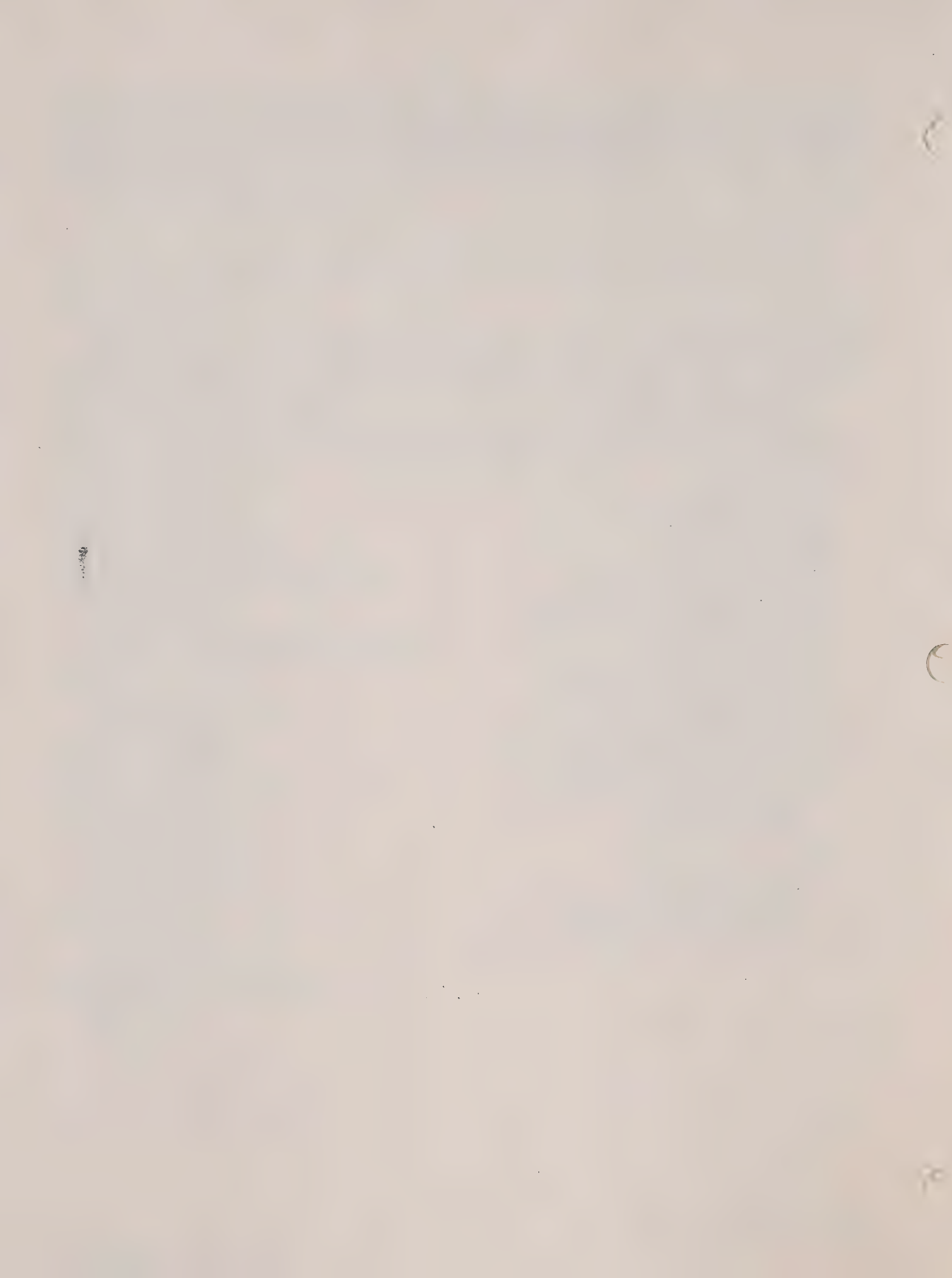
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Workers' Compensation Appeals Tribunal

Decision Digest Service

Volume 2

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Under each section heading is a list of decisions specifically referring to that section. Beside the decision number are all the relevant sections in the Annotated Statute where the decision is entered. Summaries of all decisions in the Annotated Statute will be found in the attached Summaries section. To find decisions without section numbers, refer to the Keyword Index under the appropriate subject matter.

All section numbers refer to the sections of the Workers' Compensation Act, R.S.O. 1990, c. W.11, unless otherwise noted. Sections of the Act which have been repealed or which were not consolidated in the R.S.O. 1990 are included with a special notation. For example, "Section 45 pre-1989" refers to the old permanent disability provisions.

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